# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~198~~ 266

CHARLES GIBSON, PLAINTIFF IN ERROR,

vs.

CHARLES P. CHOUTEAU AND JULIA MOFFIT, DEVISEES OF PIERRE CHOUTEAU, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

**FILED OCTOBER 24, 1870.**

# SUPREME COURT OF THE UNITED STATES.

## No. 498.

CHARLES GIBSON, PLAINTIFF IN ERROR,

vs.

CHARLES P. CHOUTEAU AND JULIA MOFFIT, DEVISEES OF PIERRE CHOUTEAU, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.


| | Original. | Print. |
|---|---|---|
| Summons | 2 | 2 |
| Sheriff's return | 2 | 2 |
| Answer of John Cook | 3 | 2 |
| On motion, amended answer of Pierre Chouteau filed by leave of court | 3 | 3 |
| Amended answer of Pierre Chouteau, jr | 4 | 3 |
| Reply to third answer of Pierre Chouteau, jr., filed | 5 | 5 |
| Reply to second answer | 7 | 6 |
| Answer of Charles P. Chouteau filed | 12 | 10 |
| Answer of Charles P. Chouteau | 12 | 10 |
| Jury waived—trial begun | 13 | 11 |
| Verdict for Charles P. Chouteau, and trial continued | 13 | 11 |
| Trial progressed and case submitted | 13 | 12 |
| Judgment | 14 | 12 |
| Motion for new trial filed and overruled | 14 | 12 |
| Stipulation for filing a bill of exceptions | 14 | 13 |
| Bill of exceptions filed | 15 | 13 |
| Bill of exceptions | 15 | 13 |
| Patent of United States to Mary MacRee, assignee of James Y. O'Carroll | 15 | 13 |
| Map | 16 | 14 |
| Letters patent to Mrs. MacRee | 19 | 17 |
| Deed of Mary MacRee to Gibson | 20 | 18 |
| John Flournoy's testimony | 22 | 19 |
| New Madrid certificate No. 150 | 22 | 19 |
| Location of certificate No. 150 | 23 | 20 |
| Certificate of Joseph C. Brown, agent of C. Wilt | 23 | 21 |
| Map | 24 | 21 |
| Deed of George Ruddell to James Tanner and Andrew P. Gillespie | 25 | 22 |

| | Original. | Print. |
|---|---|---|
| Deed of George Ruddell to George Dameron | 26 | 23 |
| Deed of George Ruddell and wife to Andrew P. Gillespie | 28 | 24 |
| Deed of Andrew P. Gillespie to James Tanner | 29 | 26 |
| Deed of Andrew P. Gillespie to James Tanner | 30 | 27 |
| Deed of James Y. O'Carroll to George Ruddell | 31 | 27 |
| Deposition of Michael Branham | 33 | 29 |
| Deed of Rachel Dameron to James Tanner | 36 | 31 |
| Deed of James Tanner to Christian Wilt | 37 | 32 |
| Deed of Hempstead, guardian of George W. Wilt, to Joseph Hertzog | 39 | 34 |
| Record and proceedings in Hertzog vs. Wilt | 42 | 36 |
| Deed of Joseph Hertzog to L. Devotion's trustees | 48 | 42 |
| Deed of Hertzog, by trustee, to P. Chouteau, jr | 51 | 45 |
| Deed of Joseph Hertzog, by sheriff, to H. Clay, executor of James Morrison | 53 | 46 |
| Judgment of circuit court in case of Clay vs. Joseph Hertzog | 56 | 49 |
| Deed of H. Clay and wife to Ann F. McRee | 58 | 50 |
| Deed of Ann F. McRee et al. to Samuel McRee | 59 | 52 |
| Transcript of record of McRee vs. Hempstead et al | 61 | 53 |
| Summons | 66 | 58 |
| Sheriff's return | 66 | 58 |
| Affidavit of non-residence | 66 | 58 |
| Proof of publication | 67 | 59 |
| Decree | 69 | 60 |
| Deed of Samuel McRee and wife to Pierre Chouteau, jr | 70 | 61 |
| Confirmation to J. Calve's representatives | 71 | 62 |
| Map | 73 | 64 |
| Map | 74 | 65 |
| Charles P. Cheuteau's testimony | 74 | 65 |
| P. A. Berthold's testimony | 75 | 66 |
| John R. Shepley's testimony | 75 | 66 |
| Certificate of annulment of survey No. 2498 | 76 | 67 |
| Order of recorder of land titles, &c | 77 | 68 |
| Decision of Commissioner of General Land Office | 78 | 68 |
| Decisions of the Secretary of the Interior | 78 | 69 |
| General instructions of Commissioner of General Land Office, &c | 79 | 69 |
| Will of Samuel McRee | 80 | 70 |
| Patent certificate to James Y. O'Carroll, &c | 82 | 72 |
| Deposition of William T. Mason | 83 | 73 |
| Robert V. Corcoran's deposition | 86 | 75 |
| Deposition of William G. McRee | 86 | 76 |
| Deposition of Mary McRee | 87 | 77 |
| Exhibit A, letter of Gibson to Shepley | 90 | 79 |
| Exhibit B, letter from Gibson to C. and P. Chouteau | 90 | 79 |
| Instructions by defendant | 91 | 80 |
| Instruction by the court | 94 | 82 |
| Motion for new trial | 94 | 83 |
| Affidavit for appeal and bond filed, and appeal granted | 95 | 83 |
| Affidavit for appeal | 95 | 84 |
| Bond | 95 | 84 |
| Clerk's certificate | 96 | 85 |
| Map | 96 | 85 |
| Agreement as to record | 97 | 86 |
| Documents filed under agreement | 97 | 86 |
| Claim of James Y. O'Carroll | 99 | 87 |
| Proceedings of board of commissioners | 100 | 88 |

| | Original. | Print. |
|---|---|---|
| Judgment | 105 | 93 |
| Motion to set aside judgment | 108 | 93 |
| Motion sustained | 111 | 95 |
| Judgment | 115 | 96 |
| Motion for entry nunc pro tunc | 117 | 96 |
| Motion sustained | 118 | 97 |
| Judgment | 122 | 97 |
| Bond | 124 | 98 |
| Citation | 127 | 98 |
| Acknowledgment of service | 128 | 99 |
| Writ of error | 130 | 99 |
| Clerk's certificate | 131 | 100 |

*a* STATE OF MISSOURI, *ss :*

Be it remembered that heretofore, to wit, on the thirtieth day of September, eighteen hundred & sixty-five, a transcript was filed in the office of the clerk of the supreme court, held at St. Louis, of the State of Missouri, which is in the words and figures following, to wit:

1 *Record.*

STATE OF ST. LOUIS, *County of St. Louis, ss :*

Be it remembered that, on the twenty-third day of September, in the year of our Lord one thousand eight hundred and sixty-two, there was filed in the office of the clerk of the St. Louis land court a petition; which petition is in words and figures following, to wit:

In the St. Louis land court, October term, 1862, St. Louis County, Mo.

CHARLES GIBSON, PLAINTIFF,
*vs.*
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and John Cook, defendants.

Plaintiff makes the following statements:

1st. That the defendants were, on the twentieth day of August, eighteen hundred and sixty-two, in possession of the following real estate in the county of St. Louis, to wit:

All that portion of United States private survey, number twenty-four hundred and ninety-eight, in the name of James Y. O'Carroll, or his representatives, which is bounded west and north by the outboundary lines of said survey, and east by other portions of said survey now and then in the possession of Mrs. Mary MacRee and her tenants, and south by United States survey 1286 and 1289, in favor of Jeannette, and which portion contains sixty-four acres, more or less.

2nd. That Mrs. Mary MacRee was, prior to said 20th of August, 1862, invested by the United States with the title to said premises, and, being so invested with the title thereto, conveyed the same to the plaintiff.

3rd. That the plaintiff was, on the 20th of August, 1862, entitled to the possession of said premises, and, being so entitled to the same, the said defendants unlawfully entered into possession thereof, and unlawfully detained the same from the plaintiff, to his damage in the sum of three thousand dollars; that the monthly rents and profits of said premises are of the value of seventy dollars.

Wherefore plaintiff asks judgment for possession of said premises, and for three thousand dollars damages for the unlawful withholding of the same, and for said monthly rents and profits.

JAMES R. LACKLAND, and
JOHN FLOURNOY,
*Attorneys for Plaintiff.*

STATE OF MISSOURI, *County of St. Louis :*

John Flournoy, one of the plaintiff's attorneys, being duly
2 sworn, says that the foregoing petition, and the matters therein as stated, he believes to be true.

JOHN FLOURNOY.

Subscribed and sworn to before me this 23d day of September, A. D. 1862.

ROBERT WHITE, *Clerk*,
By CHA'S LEVY, *Deputy*.

Upon the filing of the above petition the clerk then issued to the sheriff of St. Louis County a summons; which summons is in the words and figures following, to wit:

*Summons.*

THE STATE OF MISSOURI, *County of St. Louis, ss:*

To the sheriff of St. Louis County, greeting:

We command you to summons Pierre Choteau, jr., Charles P. Choteau, and John Cook to appear before the judge of our St. Louis land court on the first day of the next term thereof, to be held in the city of St. Louis, within and for the county of St. Louis, on the second Monday of October next, then and there to answer the complaint of Charles Gibson, as set forth in the annexed petition. And have you then and there this writ.

Witness Robert White, clerk of our said court, with the seal thereof hereto affixed, at office, in the city of St. Louis, this twenty-fourth day of September, in the year of our Lord eighteen hundred and sixty-two.

ROBERT WHITE, *Clerk*,
By CHA'S LEVY, *Deputy*.

Upon which summons the sheriff made his return in the words and figures following, to wit:

*Sheriff's return.*

Executed this writ in the county of St. Louis, on the 25th day of September, 1862, by leaving a copy of the writ and petition, as furnished by the clerk, at the usual place of abode of Charles P. Chouteau, with a white person of his family over the age of fifteen years; and by leaving a copy of this writ, as furnished by the clerk, at the usual place of abode of Pierre Chouteau, jr., with a white person of his family over the age of fifteen years; and by delivering a copy of this writ, as furnished by the clerk, to John Cook.

JOHN H. ANDREWS, *Sheriff*,
By A. R. ROSS, *Deputy*.

3 And afterwards the following proceedings were had in this cause, to wit:

*Answer of John Cook.*

Friday, December 12th, 1862.

CHARLES GIBSON
*vs.*
PIERRE CHOUTEAU, JR., ET AL. } October term, 1862.

Answer of John Cook filed in this cause; which answer of John Cook is in the words and figures following, to wit:

In the St. Louis land court, to October term, 1862.

CHARLES GIBSON, PLAINTIFF,
*vs.*
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and John Cook, defendants.

The said defendant John Cook comes, and for answer to said petition says that he had not at the commencement of this suit, has not now, and never had, any interest in the premises mentioned in the petition, either by possession or other claim of title; and defendant disclaims any interest in this controversy, and denies that he unlawfully, or in any other way, detains the premises from the plaintiff, and says that he is improperly made a defendant, because he has no interest, and claims none, in the said premises, and never had any interest, and never claimed any before or since the commencement of this suit.

HILL & BURWELL, *for Def't.*

The above defendant John Cook on oath says the foregoing answer, and the matters and things in the above answer as therein stated, are true, to the best of his knowledge and belief.

JOHN COOK.

Sworn to and subscribed before me this day of December, 1862 as witness my hand and official seal.

[L. S.]

E. H. VORDTRIEDE,
*Notary Public St. Louis County, Mo.*

And afterwards the following further proceedings were had in this cause, to wit:

*On motion amended answer of Pierre Chouteau filed by leave of court.*

Wednesday, April 29th, 1863.

CHARLES GIBSON
*vs.*
PIERRE CHOUTEAU ET AL. } March term, 1863.

Now, at this day, there is filled in this cause a motion for leave
4 to file an amended answer in this cause; and the same being submitted to the court, it is ordered that the defendant Pierre Chouteau, jr., have leave to file an answer. And thereupon the amended answer of said defendant is filed in this cause; which amended answer of Pierre Chouteau, jr., is in the words and figures following, to wit:

*Amended answer of Pierre Chouteau, jr.*

In the St. Louis land court, October term, 1862.

CHARLES GIBSON, PLAINTIFF,
*vs.*
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and John Cook, defendants.

The said defendant Pierre Chouteau, jr., impleaded with Charles P.

Chouteau and John Cook, for his separate answer says that he denies that he unlawfully withholds from the plaintiff the possession of said premises; he denies that the plaintiff is entitled to the possession of said premises, or any part thereof; and defendant denies that he, defendant, was ever jointly in possession of said premises with the defendants Charles P. Chouteau and John Cook, or either of them; and he denies that the said Charles P. Chouteau and John Cook, or either of them, ever were, or are now, in possession of said premises, or of any part thereof.

Defendant denies that the plaintiff, on the 20th day of August, 1862, or at any other time, was entitled to the possession of said premises, and that said defendant unlawfully entered into possession thereof.

Defendant denies that, on or prior to the 20th day of August, 1862, the said Mrs. Mary MacRee was invested by the United States with the title to the premises sued for, or signed thereof.

Defendant has no knowledge or information sufficient to form a belief whether the said Mary MacRee conveyed the said premises to the plaintiff or not, and he requires proof thereof as though this allegation of the petition was denied.

And defendant has no knowledge or information sufficient to form a belief as to the deeds under which the plaintiff claims title, and requires full and strict proof of the entire title of the plaintiff through each link in the chain of his alleged title.

This defendant further says that he has had and held possession, open, notorious, continued, and uninterrupted, of the premises in the petition described, claiming them as his own, adversely to all persons, for more than ten years before the commencement of this suit; and the plaintiff is barred in this action by the statute of limitations, and the title of this defendant is perfect by the said statute, which this defendant here pleas and relies on in bar of this action.

And this defendant further says that the right, title, and interest of the said plaintiff which he claims or pretends to have in said premises, and all and every deed which he may produce and show in support of such title and claim, if any such he may produce and show, were acquired and obtained by the said plaintiff as agent or attorney of and for this defendant, and for the use of and in trust for this defendant; and defendant says that each and every deed for said premises, or any part thereof, under which the said plaintiff claims or pretends to claim said premises, were procured and obtained by said plaintiff while acting as agent and for this defendant, and such deeds were fraudulently and wrongfully made to said plaintiff by his procurement, in violation of the rights of this defendant, instead of to this defendant, as of right they should have been.

And defendant denies that, by virtue of any such deed or conveyances in any form, any right of title vested, or could vest, in the said plaintiff to the prejudice of this defendant; and defendant denies that plaintiff can or ought to maintain this suit, and be allowed to use such deeds in evidence in support of his pretended title to the premises.

And this defendant says he and those through whom he claims title have been in the open, notorious, and continuous possession of the premises in question, claiming them adversely to all other persons, for about forty years next before the commencement of this suit; and defendant says the plaintiff is barred by lapse of time and laches from claiming any equitable relief, by location or otherwise, within the land

located as 640 acres, No. 150 of New Madrid location, in St. Louis County, State of Missouri.

HILL & BURWELL,
*Attorneys for Defendants.*

STATE OF MISSOURI, *County of St. Louis, ss:*

Charles P. Chouteau, agent, and the defendant, Pierre Chouteau, jr., being duly sworn, on his oath says that the foregoing answer, and the matters therein as stated, he believes to be true.

CHARLES P. CHOUTEAU.

Sworn to and subscribed before me this 28th day of April, A. D. 1863.

Witness my hand and notarial seal.

[L. S.] E. H. VORDTRIEDE,
*Notary Public St. Louis County, Mo.*

And afterwards, to wit, at the same time, the following further proceedings were had in this cause, to wit:

*Reply to third answer of Pierre Chouteau, jr., filed.*

Friday, May 1st, 1863.

CHARLES GIBSON
*vs.*
PIERRE CHOUTEAU, JR., ET AL.

Reply to third answer of Pierre Chouteau, jr., filed in this cause; which reply is in the words and figures following to wit:

6 In the St. Louis land court.

CHARLES GIBSON, PLAINTIFF,
*vs.*
PIERRE CHOUTEAU, JR., ET AL., DEFENDANTS.

The plaintiff, by leave of court, files the following reply to so much of the third answer of Pierre Chouteau, jr., as sets up new matter not responsive to the petition in this case:

The plaintiff is unable to reconcile the statement in the answer, that said defendant "had no knowledge or information sufficient to form a belief as to the deeds under which the plaintiff claims," with the averment in the answer that "each and every deed" "under which the said plaintiff claims or pretends to claim said premises were procured and obtained by said plaintiff while acting as agent for this (said) defendant."

The plaintiff is surprised that even Mr. Chouteau should in one and the same affidavit swear that he believes both of these averments to be true.

The plaintiff denies that he is barred of this action by the statute of limitations, or that the title of said defendant is perfect by said statute.

The plaintiff denies that the right, title, and interest which he claims and pretends to have in said premises, or any deed which he will produce or show in support of such title or claim, was obtained by him as agent and attorney of or for said defendant.

As to the allegations that each and every deed, or any part thereof,

under which said plaintiff claims, or pretends to claim, said premises, was procured by said plaintiff while acting as agent for said defendant, and that such deeds were fraudulently and wrongfully made to said plaintiff by his procurement, in violation of the rights of said defendant, instead of to said defendant, the plaintiff says the same is utterly and absolutely false.

The plaintiff has no knowledge or information sufficient to form a belief as to whether the said defendant has been in possession of said premises for forty years, as alleged, and therefore he denies the same.

The plaintiff denies that he has been guilty of any laches, or is, or ought to be, barred by any lapse of time or laches from claiming such relief as he may be entitled to in this case.

The plaintiff states further, that after the said Pierre Chouteau had filed his first answer to the plaintiff's petition, in which he makes general charges against this defendant, similar to those in this his third answer, he requested leave, and the court granted him leave, to file a more specific answer.

That said defendant thereupon filed an answer and cross-bill, in which he made a detailed and specific statement of all his charges against the plaintiff; and thereupon the plaintiff filed a reply, specifically and in detail, to said allegations of said Pierre Chouteau.

The said plaintiff further says that said defendant, well knowing that said allegations were false and slanderous, and could not be
7 supported by proof, obtained permission of this court to file a third answer, for the purpose of avoiding a specific statement of his charges, and to fall back upon vague and general charges contained in his first answer; and the plaintiff, believing that the defendant has abused the leave granted him by the court in thus acting, under these circumstances prays to be permitted to refer to his reply to said second answer as if the same was incorporated herein, and as a specific statement on his part of the matters therein contained; and, inasmuch as said reply was full and particular, he deems a general reply to the general charges in this third answer sufficient.

C. GIBSON.

ST. LOUIS COUNTY:

Charles Gibson, being duly sworn, says he believes the matters in the above reply as therein stated are true.

C. GIBSON.

Sworn to and subscribed before me this 1st day of May, A. D. 1863.

ROBERT WHITE, *Clerk*,
By E. P. WALSH, *Deputy*.

The reply to said second answer, as if the same was incorporated herein, referred to in the above and foregoing reply, is in the words and figures following, to wit:

*Reply to second answer.*

In the Saint Louis land court, October term, 1862.

CHARLES GIBSON, PLAINTIFF,
*vs.*
PIERRE CHOUTEAU ET AL., DEFENDANTS.

The plaintiff, by leave of the court first obtained, files this his reply to

the so-called cross-bill, filed by Pierre Chouteau in this case, reserving all exceptions to the right of the defendant to file any cross-bill in this case, and also to the sufficiency of said bill.

The plaintiff emphatically denies that the right, title, and interest of the plaintiff, and which he claims and pretends to have in said premises, and on which right, title, and interest this suit is brought, were acquired by said plaintiff as agent and attorney for said Pierre Chouteau, or for the use of the said Pierre Chouteau.

The plaintiff denies that each and every deed, or any deed whatever, for said premises, or any part thereof, under which said plaintiff claims or pretends to claim said premises, were procured or obtained by said plaintiff while acting as agent and attorney of said Pierre Chouteau.

And as to the charge that said deeds were fraudulently and unlawfully made to said plaintiff by his procurement, instead of to the defendant, the plaintiff says the same is utterly and absolutely false.

And in this connection the plaintiff says that he never had any
8 personal acquaintance with said Pierre Chouteau; that he never was employed by him, or by any one for him, to act as his counsel, attorney, or agent, in regard to said title or said premises, or in any other matter whatever; that he never received any money or anything whatsoever, nor any promise or obligation whatsoever, from said Pierre Chouteau, or any one acting for him, in regard to said premises, or the title to the same, or in regard to any other matter whatever.

The plaintiff denies that said Holmes brought actions of ejectment against said Mrs. Mary MacRee and P. Chouteau, or their tenants.

He denies that the attorneys of said Mrs. MacRee and P. Chouteau united or aided each other in the defence of said suits in the year 1855 or 1856.

He denies that, in consultation between the plaintiff and the attorney of said P. Chouteau, for the purpose of more effectually defending or providing for the defence of the said MacRee and Pierre Chouteau, it was deemed advisable for the said MacRee and Chouteau to buy in claims and procure deeds from certain persons supposed to be the heirs of one Peter Ruddle and George Dameron, to aid them in their defence, and that the said plaintiff was agreed upon and selected by the said Chouteau and MacRee as a suitable person to entrust with the duty, trust, and agency of procuring certain deeds from the supposed heirs of said George Ruddle and George Dameron, for the sole use and benefit of MacRee and Chouteau, to the extent of their several and respective possessions of the lands included within the John (James) Y. O'Carroll's New Madrid location, including the premises in dispute, or that the same was ever owned by Chouteau.

The plaintiff denies that he was ever furnished moneys by said MacRee and Pierre Chouteau to enable him to perform and execute said alleged trust and agency for the procuring of said deeds.

The plaintiff denies that he ever did, under said alleged employment, or as agent or attorney, as alleged, of said Pierre Chouteau and Mrs. Mary MacRee, procure any deed or deeds to the premises in dispute, or that he ever sought to have procured any deed to be made to the said Pierre Chouteau.

The plaintiff denies that he pretends or ever pretended that he was acting in the procurement of any deeds from the heirs of Ruddle and Dameron for himself and his own benefit, but he denies that he ever acted for the benefit of said P. Chouteau in the procurement of said deeds. He will hereinafter explain how and for whom he acted in this matter.

He denies that the title he claims, or that any deed or deeds under which he claims, was acquired by virtue or under the alleged trust and agency aforesaid, or that he has no right or title except what was acquired as alleged, or that any of his acts or doings were against equity and good conscience.

The plaintiff denies that the said P. Chouteau has always been ready or willing to pay all or any moneys expended by the plaintiff
9 in and about the acquisition of said titles, or to account with the plaintiff, or that said P. Chouteau ever pretended, until the filing of this cross-bill, that the plaintiff had ever received any money from him, said P. Chouteau, or any one acting for him, for the purpose alleged, or for any purpose whatever, or that he ever undertook, promised, or agreed to pay him any.

The plaintiff says that the following is a correct statement of his connection with said suits in ejectment, the lands of Mrs. MacRee, and the procuring of the deeds made to him by the heirs of George Ruddle and George Dameron, so far as relates to the controversy regarding said premises in dispute:

Colonel Samuel MacRee died in 1849, leaving to his widow a large and valuable estate in lands, which had been in the undisputed possession of himself and those under whom he claimed for more than twenty years before his death.

His widow knew nothing of the nature of the title to this property, and her children were then mere boys, incapable at that time of understanding business.

Shortly after the death of Col. MacRee a number of suits were brought for the purpose of ousting Mrs. MacRee of her said lands, and among the number was one by Charles P. Chouteau and others, who claimed, under the said P. Chouteau and others, for a tract of great value, and involving the title to the homestead of Mrs. MacRee. Under these circumstances the said Mrs. MacRee employed the plaintiff as her counsel and attorney to do all things necessary or useful in the defence of any cases brought into this court.

Acting under the authority thus conferred upon him, the plaintiff employed H. R. Gamble, H. S. Geyer, and Edward Bates, to assist him in the defence of the ejectment suits brought by Peter H. Holmes.

Mrs. MacRee paid to Governor Gamble $3,500, to Senator Geyer $1,500, and to Hon. Edward Bates $500, for their services in defending these cases, exclusive of large amounts to the plaintiff.

The plaintiff on many occasions requested Messrs. Shepley and Hill, who appeared for said Chouteau in the cases brought against him by said Holmes, to pay his fair proportion of the fees paid Messrs. Gamble, Geyer, and Bates, and the necessary costs of trial, &c., but he neither did nor would pay the same, but, on the contrary, has, from the commencement of said litigation, "skulked" behind Mrs. MacRee, and thus escaped both costs and counsel fees.

The counsel of Mr Chouteau, though learned and able, had little experience in old land litigation compared with said Gamble, Geyer, and Bates. They took notes of points made upon the various trials, learnt the views, etc., of those Nestorian members of the bar, but rendered no assistance, and could render none, in the preparation or trial of Mrs. MacRee cases.

During the first trial of these ejectments in the circuit court of the United States in 1856, the plaintiff suggested to Mr. Shepley, one of Chouteau's counsel, that neither MacRee nor Chouteau had any
10 title to said premises as matters then stood, and that the title

of the heirs of Ruddle ought to be purchased by them. This was a few hours after the deed of George Ruddle, under which both MacRee and Chouteau claimed, had been excluded by the court.

The plaintiff mentioned this conversation to his principal, Mrs. MacRee, and she positively refused to have any connection whatever with Chouteau, under any circumstances, on account of the Chouteau suit against her, and the disgraceful circumstances under which it was brought by them against her.

The said conversation was merely casual, during a trial in court, and neither Mr. Shepley nor plaintiff were authorized to act for Chouteau or MacRee respectively. Shortly thereafter the plaintiff discovered that said Chouteau intended to "skulk" in the defense of said suits, and he ceased to have any further communication with his counsel in regard to the cases. The above was the only conversation he ever had in regard to the purchase of said titles with any one claiming to act for Chouteau.

About this time the plaintiff proceeded, under the directions of Mrs. MacRee, and with her money or moneys advanced to her by the plaintiff, and charged at the time to her, to buy up, and did purchase, said titles for her use and benefit alone.

The plaintiff never pretended to purchase the same for his own benefit, but had the deeds made to himself at the request and by understanding of Mrs. MacRee.

After the purchase of said titles by the plaintiff for the use of Mrs. MacRee, and about the time the supreme court of Missouri decided the case of Chouteau and others vs. Mrs. MacRee to be both immoral and illegal, the said Mrs. MacRee, out of consideration of the unusual fidelity of the plaintiff to her in all of her affairs, and especially in defending her against the efforts of said Chouteau and others unjustly to deprive her of her homestead, and under circumstances that justly aroused her indignation, voluntarily gave and granted the title thus purchased to that portion of the O'Carrol tract embraced in the premises in dispute, together with other valuable real estate, to the plaintiff.

The plaintiff, however, in the year 1857, moved by the generosity of his client, and desiring to settle the costly litigation then greatly oppressing her, notwithstanding he had no personal interest in her estate or property, but, on the contrary, was, by said litigation, receiving large fees, proposed in writing to Mr. Shepley, counsel for Chouteau, that he would convey the title thus vested in him to Chouteau, provided the case of Chouteau and others vs. Mrs. MacRee was not prosecuted further, and the title set up against her in that case was vested in her; said Chouteau to pay his proportion of the cost of the purchase of said titles from the heirs of Ruddle and Dameron, and the fees in court which he ought to have paid.

Said Chouteau expressed himself as willing to compromise by paying his portion of the title claimed to Mrs. MacRee's homestead, but he was unwilling to obtain the whole title. Said Gibson spent con-
11 siderable time and labor in endeavoring to pursuade the other plaintiffs to desist from prosecuting Mrs. MacRee, but did not succeed in doing so. He warned said Chouteau at the time against permitting said suit to be further prosecuted, and that if he did so he would himself be prosecuted for the premises in dispute. This proposition of said plaintiff was not accepted; on the contrary, the said case of Chouteau and others vs. MacRee, notwithstanding the supreme court of this State had decided it to be immoral, was appealed to the Supreme Court of the United States, and the defense of this appeal cost

Mrs. MacRee one thousand dollars, paid M. Blair, and fifteen hundred dollars or thereabouts, paid H. R. Gamble, fees as counsel.

The judgment of the supreme court was affirmed by the Supreme Court of the United States, and it is under these circumstances, and after the affirmance of this judgment, that it is claimed that said titles were bought by the plaintiff for the use of Chouteau, and with his money.

The plaintiff especially requires proof as to the amount of money paid or delivered to him by Pierre Chouteau, jr.; when paid or delivered, or agreed to be paid and delivered; what compensation the plaintiff was to receive from said Chouteau; and all the circumstances of such alleged employment.

The plaintiff says his client, Mrs. MacRee, having positively declined to have any transactions, under any circumstances, with Chouteau, on account of the suit of Chouteau against her, and the circumstances under which it was brought, it would have been a breach of the trust and confidence reposed in him by Mrs. MacRee for him to have undertaken to act for said Chouteau.

The plaintiff voluntarily agreed, in case of his recovering in this action, with Mrs. MacRee, to refund her the costs and fees paid by her in said case of Chouteau and others against her and her other cases.

The plaintiff says that said cases of Holmes are still pending, and the said Chouteau is still "skulking" as aforesaid.

CHARLES GIBSON.

STATE OF MISSOURI, *County of St. Louis:*

Charles Gibson, being duly sworn, says the matters in the above reply as therein stated are true.

CHARLES GIBSON.

Subscribed and sworn to before me this 10th day of April, A. D. 1862.

ROBERT WHITE, *Clerk*,
By CHA'S LEVY, *Deputy.*

12 And afterwards, to wit, at the same term, the following further proceedings were had in this cause, to wit:

*Answer of Charles P. Chouteau filed.*

Friday, May 1st, 1863.

CHARLES GIBSON
*vs.*
PIERRE CHOUTEAU, JR., ET AL.

Answer of Charles P. Chouteau filed in this cause; which answer of Charles P. Chouteau is in the words and figures following, to wit:

*Answer of Charles P. Chouteau.*

In the St. Louis land court, October terms, 1862.

CHARLES GIBSON, PLAINTIFF,
*vs.*
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and John Cook, defendants.

The said defendant Charles P. Chouteau comes, and for answer to

said petition says that he had not at the commencement of this suit, has not now, and never had, any interest in the premises mentioned in the petition, either by possession or other claims of title; and defendant now disclaim any interest in this controversy, and denied that he unlawfully or in any other way detains the premises from the plaintiff, and says that he is improperly made a defendant, because he says he has no interest, and claims none, in said premises, and never had any interest, and never claimed any, before or since the commencement of this suit.

HILL & BURWELL,
*Attorneys for Def't.*

The above defendant Charles P. Chouteau on oath says the foregoing answer, and things in the same as therein stated, are true to the best of his knowledge and belief.

CHARLES P. CHOUTEAU.

Sworn to and subscribed before me this 28th day of April, 1863.
[L. S.] E. H. VORDTRIEDE,
*Notary Public St. Louis County, Mo.*

And afterwards the following proceedings were had in this cause, to wit:

13 *Jury waived.—Trial begun.—Verdict for Cha's P. Chouteau, and trial continued.*

Wednesday, Nov. 25, 1863.

CHARLES GIBSON
*vs.*
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and John Cook. } October term, 1863.

Trial begun.

Now at this day comes said parties by their respective attorneys; and thereupon this cause coming on for trial, and said parties waiving a jury, the cause is tried by the court upon the evidence herein and the proofs adduced; and the evidence on the part of the plaintiff being closed, the court thereupon, on motion of defendant Charles P. Chouteau, by his attorney, doth find a verdict herein for said defendant Charles P. Chouteau; and it is thereupon ordered and adjudged by the court that said defendant go hence without day, and recover of said plaintiff his costs and charges herein expended; and thereupon the trial progressed, and, not being fully terminated, it is continued until to-morrow morning for argument of counsel.

And the further progress of the trial of this cause continued on the following day, to wit, Thursday, November 26th, 1863, and, not being fully terminated, is continued until to-morrow morning.

And afterwards, to wit, at the same term, the following further proceedings were had in this cause, to wit:

*Trial progressed and cause sub.*

Friday, November 27th, 1863.

CHARLES GIBSON
*vs.*
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and John Cook.

Trial progressed.

And now again, at this day, comes said plaintiff and the defendant Pierre Chouteau, jr., and John Cook, by their respective attorneys, and thereupon the trial progressed; and the evidence being concluded, the cause is submitted to the court, and the court, not being fully advised of and concerning the premises, takes time to consider thereon.

And afterwards the following further proceedings were had in this cause, to wit:

14 *Judgment.*

Saturday, January 28th, 1865.

CHARLES GIBSON
*vs.*
PIERRE CHOUTEAU, JR., AND JOHN COOK. } October term, 1864.

Trial ended—judgment.

And now again, at this day, comes said parties, by their respective attorneys; and the court, being now fully advised of and concerning the premises, finds the issue herein for the plaintiff, and doth assess his damages at the sum of six hundred dollars, and the monthly value of the rents and profits of the premises sued for at fifty dollars. It is therefore ordered and adjudged by the court that the plaintiff recover of said defendants the possession of the following described real estate, in the county of St. Louis, to wit: All that portion of United States private survey number twenty-four hundred and ninety-eight, in the name of James Y. O'Carroll, or his representatives, which is bounded west and north by the out-boundary lines of said survey, and east by other portions of said survey now and then in possession of Mrs. Mary MacRee and her tenants, and south by United (States) survey 1286 and 1289, in favor of Jeannette, and which portion contains sixty-four acres, more or less, and also the damages and monthly value aforesaid, in form aforesaid as assessed, together with his costs and charges herein expended; and that he have execution therefor.

And afterwards, to wit, on the same day, the following further proceedings were had in this cause, to wit:

*Motion for a new trial filed and overruled.*

CHARLES GIBSON
*vs.*
PIERRE CHOUTEAU, JR., ET AL.

Now at this day there is filed in this cause a motion for a new trial, and the same is submitted to the court; and the court, being fully advised of

and concerning the premises, doth order and adjudge that said motion be overruled.

And afterwards, to wit, on the same day, the following further proceedings were had in this cause, to wit:

*Stipulation for filing a bill of exceptions.*

CHARLES GIBSON
*vs.*
PIERRE CHOUTEAU, JR., ET AL.

Now at this day there is filed in this cause a stipulation in words and figures following: Charles Gibson vs. Pierre Chouteau et al., St. Louis land court. It is agreed that the defendant may present any instructions to the court additional to the fifteen already presented to the court, and that they may be passed upon by the court in the same manner and with a like effect as if presented and passed upon at the time of the trial of this cause, and that the bill of exceptions in this case may be presented to the judge of this court, and allowed in vacation, with the same effect as if the said bill of exceptions had been presented to the court and allowed during the present session of said court, and release all errors on account thereof.

C. GIBSON,
HILL, GLOVER & SHEPLEY,
*Attorneys for Defendants.*

And afterwards the following further proceedings were had in this cause, to wit:

*Bill of exception filed.*

Monday, February 27th, 1865.

CHARLES GIBSON
*vs.*
PIERRE CHOUTEAU, JR., ET AL.

In vacation—bill of exceptions filed in this cause; which bill of exceptions is in the words and figures following, to wit:

*Bill of exceptions.*

CHARLES GIBSON, PLAINTIFF,
*vs.*
PIERRE CHOUTEAU, JR., CHARLES P. CHOUTEAU, and John Cook, defendants.
In the St. Louis land court.

Be it remembered that, on the trial of the above cause, the plaintiff gave in evidence the following deed and documents, to wit:

1. Patent of the United States to Mary MacRee, assignee of James Y. O'Carroll, dated the 10th day of June, 1862, as follows:

*Patent of U. S. to Mary MacRee, assignee of James Y. O'Carroll.*

The United States of America to all to whom these presents shall come, greeting:

Whereas there has been deposited in the General Land Office a cer-

tificate, numbered four hundred and ninety-four, of the recorder of land titles at St. Louis, Missouri, whereby it appears that, in pursuance of the act of Congress approved on the seventeenth day of February, one thousand eight hundred and fifteen, entitled "An act for the relief of the late inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," and the several acts of
16 Congress amendatory and explanatory of the same, there has been located for James Y. O'Carrol, or his legal representatives, the following tract of land, to wit:

"*Survey No.* 2498.

"Plat and description of the survey of a tract of land of six hundred and forty acres, situated in township forty-five north of the base line, range seven east of the fifth principal meridian, in the State of Missouri, executed in April, eighteen hundred and eighteen, by Joseph C. Brown, deputy surveyor, under contract with, and instructions from, William Rector, surveyor of the lands of the United States in the Territories of Illinois and Missouri, dated the thirty-first of March, eighteen hundred and seventeen; this being the tract located on the sixteenth of June, eighteen hundred and eighteen, by Joseph C. Brown, for Christian Wilt, the legal representative of James Y. O'Carroll, in virtue of a certificate numbered one hundred and fifty, issued on the 30th of November, 1815, by Frederick Bates, United States recorder of land titles in the Territory of Missouri, in conformity with the provisions of the act of Congress of the seventeenth of February, eighteen hundred and fifteen, entitled 'An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes.' The location above mentioned calls for, including fractional sections twenty, in township forty-five north, and range seven east, the same in which St. Louis is situated, that part of fractional section seventeen, in the same township, which lies south of the Cul de Sac Fields, the western half of fractional section twenty-one, in the same township, and so much off from the north side of the western half of fractional section twenty-eight, in the same township, as will make the quantity. Such lines of this survey as have subsequently been remeasured in whole or in part as the lines of other surveys adjoining or interfering are herein described conformably to the remeasurement." [See plat.]

(Here follows map marked page 20.)

"*Description.*

"Beginning at a post in the east boundary of Charles Gratiot's survey numbered two thousand and thirty-seven, the northwest corner of the Prairie des Noyes Common Fields, and the most western corner of this survey, from which a pin oak, three inches in diameter, bears south twenty-seven degrees east, sixty-three links distant, and a hickory, three inches in diameter, bears north sixty-four degrees west, forty-nine and a half links distant: thence north eight degrees and forty minutes east, with the east boundary of the Charles Gratiot survey; at thirty-three chains and thirty-four links a limestone, twenty inches long, ten inches wide, four and a half inches thick, set ten inches deep, with the edge southeastward, marked with a cross on the top, the southwest corner of survey numbered three thousand three hundred and nine, in the name of Calve, from which a cottonwood, six inches in diameter, bears south

17 eighty-three degrees and thirty minutes west, eighty-nine links distant; at thirty-nine chains and seventeen and one-third links a limestone, fourteen inches long, fourteen inches wide, three and a half inches thick, set eleven inches deep, with the edge southeastward, marked with a cross on the top, the northwest corner of the Calve survey and the southwest corner of survey numbered three thousand three hundred and eight, in the name of Hubert, dit Berry, Tabeau's legal representatives, from which a cottonwood, twelve inches in diameter, bears north fifty-three degrees west, two hundred and seventy-two links distant; at forty-two chains and nine links a post, the southwest corner of survey numbered three thousand three hundred and seven, in the name of Joachim Roy's legal representatives, and the northwest corner of the Hubert representatives' survey, and from which a pin oak, ten inches in diameter, bears thirty-six degrees and forty-five minutes east, one hundred and sixty-two links distant, and a persimmon tree, four and a half inches in diameter, bears south fifty-seven degrees and thirty minutes east, fifty-nine leagues distant; at forty-six chains and forty-seven and a half links a post, the northwest corner of the Joachim Roy survey, and the southwest corner of survey numbered two thousand nine hundred and seventy-three, in the name of Amable Guion or Vieve Lecompt's legal representatives, from which a pin oak, six inches in diameter, bears south twenty-seven degrees and forty-five minutes west, fifty-six links distant; and at fifty-two chains and thirty-four and a half links a stone, the northwest corner of the Amable Guion survey, and the southwest corner of Susanah Dubreuil's survey, numbered eight hundred and thirty-three, and the most northern corner of this survey: thence south seventy-five degrees east, with the south boundary of the Susannah Dubruil survey and the north boundary of the Amable Guion survey; at eighty chains and fifty-one links a road, leading southwestward; and at eighty-six chains and fifty-one links a stone, in the west boundary of survey numbered three hundred and sixty-three, in the name of Augusta Chouteau, under Laclede Legest, the southeast corner of the Susannah Dubreuil survey, the northeast corner of the Amable Guion survey, and a corner to this survey: thence south fifteen degrees west, with the west boundary of the Augusta Chouteau survey, and a line of the Cul de Sac Prairie Common Field; at five chains and eighty-four links a stone, the southeast corner of the Amable Guion survey and a corner to the Joachim Roy survey; and at seven chains and nineteen links a limestone, marked with letter 'M' on the top, to the southwest corner of the Augusta Chouteau survey, and a corner to this and to the Joachim Roy surveys: thence south seventy-five degrees east, with the south boundary of the Augusta Chouteau survey, and the north boundary of Francis Cottard's survey, numbered three thousand one hundred and eighty-three; at two chains and thirty-four links a post, the northwest corner of survey numbered three thousand one hundred and eighty-two, in the name of Joseph Mottard, or his legal representatives, and a corner to Joachim Roy survey; at five chains and ninety links a post, the most northern
18 corner of survey numbered three thousand one hundred and twenty-five, the Saint Louis Common, from which a cherry tree, four inches in diameter, bears north seventy-six degrees west, three hundred and fifty links distant, and a pin oak, four inches in diameter, bears north sixty-six degrees and thirty minutes west, three hundred and twenty-four links distant; and at forty-four chains and sixty-one links a post, in mound, corner to this survey: thence south ninety-seven chains to a post, corner to this survey, from which a white oak, two inches in diameter, bears south nineteen degrees west, eighteen links distant, and a

white oak, two inches in diameter, bears south forty degrees west, thirty links distant: thence west twenty-seven chains to a post, in mound, in the eastern boundary of the Prairie des Noyes Common Fields, corner to this survey, from which a sassafras, two inches in diameter, bears south forty-nine degrees east, six links distant, and a sassafras, three inches in diameter, bears north forty-two degrees and thirty minutes west, fourteen links distant: thence north nine degrees and thirty minutes east, with the eastern boundary of the Prairie des Noyes Common Field, seventy-eight chains and thirty-five links to a limestone, fourteen inches long, thirteen inches wide, three and a half inches thick, set eleven inches deep, with edge westward, marked with a cross on the top, the northeast corner of the Prairie des Noyes' Common Field, and a corner to this survey: thence north eighty-three degrees west, with the north boundary of the Prairie des Noyes Common Field; at four chains and twenty-one links an old set stone; at thirty-eight chains and twenty-seven links a branch, ten links wide, runs northward; at sixty-five chains and seventeen links cross a shallow pond three chains wide; at seventy-one chains and eighty-seven links a road bears northeastward; at one hundred and sixteen chains and eighty-seven links, the beginning corner

"*Statement of interferences of survey No.* 2498 *with other surveys.*

"1st. Survey No. 3125. Saint Louis Common, confirmed to the inhabitants of Saint Louis by the act of Congress of the 13th June, 1812, entitled 'An act making further provisions for settling the claims to land in the Territory of Missouri.' Area of interferences, 251.50 acres.

"2d. Survey No. 2973. Amable Guion or Vieve Lecompt's legal representatives. A lot of 2 by about 30 arpens, in the Cul de Sac Prairie Common Field, confirmed by the act of Congress of the 13th June, 1812, and the extent and boundaries thereof proven before Recorder Hunt on the 30th July, 1825, in conformity with the provisions of the act of Congress of the 26th May, 1824, entitled 'An act supplementary to an act passed on the thirteenth day of June, one thousand eight hundred and twelve, entitled an act making further provision for settling the claims to land in the Territory of Missouri.' Area of this survey, 50.37 acres.

"3rd. Survey No. 3307. Joachim Roy's legal representatives.
19 A lot of 1½ by about 30 arpens, in the Cul de Sac Prairie Common Field, confirmed by the act of Congress of the 13th June, 1812, and the extent and boundaries thereof proven before Recorder Hunt on the 7th and 30th July, 1825, in conformity with the provisions of the act of the 26th May, 1824. Area of this survey, including its interference with survey No. 3183, 38.26 acres.

"4th. Survey No. 3308. Hubert, dit Berry, Tabeau's legal representatives. A lot of 1 by 40 arpens in the Cul de Sac Prairie Common Field, confirmed by the act of Congress of the 15th June, 1812, and the extent and boundaries thereof proven before Recorder Hunt on the 10th August, 1825, in conformity with the provision of the act of the 26th May, 1824. Area of the interference west of the Saint Louis Common, 26.85 acres.

"5th. Survey No. 3183. Francis Cottard, one by forty arpens, confirmed by the act of Congress of the 29th of April, 1816, entitled 'An act for the confirmation of certain claims to land in the western district of the State of Louisiana and in the Territory of Missouri.' Area of the interfering part that lies west of the Saint Louis Common, and east of the survey No. 3307, 1.18 acres.

"6th. Survey No. 3182. Joseph Mottard, or his legal representatives, seven by forty arpens, confirmed by the act of Congress of the 4th July, 1836, entitled 'An act confirming claims to land in the State of Missouri, and for other purposes.' See decision No. 328 of the board of commissioners, under the acts of Congress of the 9th July, 1832, and 2d March, 1833. Area of the part that lies south of survey No. 3308, and west of St. Louis Common, 1,156 acres. This survey covers land reserved at the time of the location of the James Y. O'Carroll claim.

"7th. Survey No. 3309. Calve. A lot of two by forty arpens, in the Cul de Sac Prairie Common Field.

"There is no evidence of this claim being confirmed.

"The foregoing interference, excluding that with survey No. 3309, containing 379.72 acres. To the residue of survey No. 2498, containing actually 291.45 acres, so far as the records of this office show, there is no valid claim.

"OFFICE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSOURI,
"*St. Louis, March 26th*, 1862.

"The foregoing plat and description of survey No. 2498 are correctly copied from the approved plat and description of said survey, recorded on page 268, 269, 270, and 271, of record-book A, on file in this office.
"W'M CUDDY, *Surveyor General.*"

*Letters patent to Mrs. MacRee.*

And whereas the right of the said James Y. O'Carroll, *though* sundry intermediate assignments, has been transferred to Mary MacRee, there is, therefore, granted by the United States, unto the said Mary MacRee, as assignee in right of the said James Y. O'Carroll, in
20 virtue of deraignment of title, and to her heirs, the tract of land described in the aforesaid survey, number two thousand four hundred and ninety-eight, hereby expressly excepting and excluding from the transfer, by these presents, such valid rights as may exist in virtue of the claims particularly designated under the 1st, 2d, 3d, 4th, 5th, and 6th heads in the foregoing; and further saving and excepting from the transfer, by these presents, of any other valid adverse claims, should such exist, to any part of the land embraced in the aforesaid survey, number two thousand four hundred and ninety-eight:

To have and to hold the said tract of land, according to said survey two thousand four hundred and ninety-eight, unto the said Mary MacRee, as assignee as aforesaid, and to her heirs and assigns forever, with the exceptions, reservations, and exclusions as aforesaid.

In testimony whereof I, Abraham Lincoln, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the tenth day of June, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-sixth.

By the President:

[SEAL.]

ABRAHAM LINCOLN,
By W. V. STODDARD, *Sec'y.*
J. N. GRANGER,
*Recorder of the General Land Office.*

Recorded vol. 11, pages 535 to 542, inclusive.

REC. 498—2

STATE OF MISSOURI, *County of St. Louis, ss:*

I, the undersigned, recorder in and for said county, do hereby certify that the foregoing instrument of writing was filed for record in my office August 8th, 1862, and is truly recorded in book 265, p. 469.

Witness my hand and official seal the day and year aforesaid.

[L. S.] A. C. BERNOUDY, *Recorder.*

2. A deed of Mary MacRee to Charles Gibson, dated 8th day of August, 1862, as follows:

*Deed of Mary MacRee to Gibson.*

This deed, made this 8th day of August, A. D. eighteen hundred and sixty-two, between Mary MacRee, grantor, and Charles Gibson, grantee, witnesseth: That said grantor, in consideration of three thousand dollars, to her paid by said grantee, the receipt whereof is hereby acknowledged, doth hereby grant, sell, and convey unto said Gibson a parcel of ground in the United States survey number twenty-four hundred and ninety-eight, (No. 2498,) in the name of James Y. O'Carroll, or his representatives, situated in Saint Louis County, which parcel is
21 bounded thus: northwardly by the southern line of United States survey number three thousand three hundred and seven, (No. 3307,) in the name of J. Roy, or his representatives, as said line is now established, the same being the southern boundary of Sommer's land, as now in their possession; westwarly by the old Manchester road; eastwardly by the Pacific Railroad; and southwardly by a line parallel with and a sufficient distance south of said fourth line, or said survey three thousand three hundred and seven, to make the quantity of five acres, the quantity of said parcel of land intended to be conveyed hereby being five acres precisely. And whereas the said Gibson was the selected counsellor at law of said Mrs. Mary MacRee as to certain litigation concerning her lands, and was also the agent and attorney in fact for the management of her estate in and about Saint Louis: Now, in consideration of these premises, and as an evidence of her appreciation of the zeal and fidelity he has manifested in her cause, the said MacRee doth hereby give, grant, and convey unto the said Gibson all of her right, title, and interest (and only her right, title, and interest) in and to the following described two parcels of land in said survey number two thousand four hundred and ninety-eight, (No. 2498,) and for which a patent has been issued to said MacRee, and which parcels are bounded and described as follows:

First. A parcel containing eleven acres and one-half of an acre, bounded northwardly by the land hereinabove conveyed to said Gibson; westwardly by the old Manchester road; eastwardly by the Pacific Railroad; south by a line south of and parallel with said Gibson's southern line, and a sufficient distance therefrom to make the quantity of eleven and one-half acres.

Secondly. All that portion of said United States survey two thousand four hundred and ninety-eight (No. 2498) bounded west by the western out-boundary line of said survey twenty-four hundred and ninety-eight, (2498;) north by the northern out-boundary line of the same survey; east by the new King's highway, as heretofore opened, and a line coincident with the same, projected south to United States survey twelve hundred and eighty-six and twelve hundred and eighty-nine, (1286 and 1289,) in favor of Susan Jeannette; south by said survey in favor of Susan Jeanette, and containing sixty four acres. The land

intended to be conveyed in this parcel is all that portion of said survey twenty-four hundred and ninety-eight (2498) now or heretofore in possession or claimed by Pierre Chouteau, jr., or Charles P. Chouteau, or the representatives of them, or either of them:

To have and to hold the said parcels of land and appurtenances to him, said Gibson, and his heirs and assignes forever.

In testimony whereof the said Mary MacRee has hereunto set her hand and seal the date aforesaid.

MARY MACREE. [L. S.]

STATE OF MISSOURI, *County of St. Louis, ss:*

Be it remembered that, on this second day of November, 1862, came before me, the undersigned, recorder of deeds in and for said county of St. Louis, Mary MacRee, who is personally known to me to be the same person whose name is suscribed to the foregoing instrument of writing as party thereto, and she acknowledged the same to be her act and deed for the use and purposes therein mentioned.

22

Witness my hand and official seal at office the date aforesaid.

[L. S.] A. C. BERNOUDY, *Recorder*,
Per J. CONRAD, *Deputy*.

STATE OF MISSOURI, *County of St. Louis, ss:*

I, the undersigned, recorder for said county, certify that the foregoing instrument of writing was filed for record in my office September 15th, 1862, and is truly recorded in book 269, p. 550.

Witness my hand and official seal the date aforesaid.

A. C. BERNOUDY, *Recorder*.

*John Flournoy's testimony.*

The plaintiff then examined as a witness John Flournoy, who testified that he knew the land in controversy, and that the annual value of the land was about eleven dollars per acre.

On cross-examination he stated that the deed of Samuel MacRee and wife to Pierre Chouteau described premises in dispute.

Defendants admitted that Pierre Chouteau was in possession of the premises in dispute at the time mentioned in the petition, and that Cook was there, but only as a servant.

The plaintiff here rested; and, on motion of defendant, the court found the defendant Charles P. Chouteau not guilty.

The defendant then gave in evidence the following documents and deeds, to wit:

1. New Madrid certificate No. 150, dated the 30th November, 1815, issued by Fred. Bates, recorder, as follows:

*New Madrid certificate No. 150.*

[No. 150.] OFFICE OF RECORDER OF LAND TITLES,
*St. Louis, November 30th*, 1865. [1815.]

I certify that a tract of six hundred and forty acres of land on the Mississippi, in the county of New Madrid, which appears from the books of this office to be owned by James Y. O'Carroll, has been mate-

rially injured by earthquakes; and that, in conformity to the provisions of the act of Congress of the 17th of February, 1815, the said James Y. O'Carroll, or his legal representatives, is entitled to locate six hundred and forty acres on any of the public lands of the Territory of Missouri the sale of which is authorized by law.

FREDERICK BATES.

OFFICE OF THE SURVEYOR GENERAL,
*St. Louis, Dec. 21st*, 1850.

I certify that the above is a copy of the original certificate No. 150, now on file in this office, of Frederick Bates, recorder of land
23 titles in the Territory of Missouri, issued under the provisions of the act of Congress, therein mentioned, of the 17th of February, 1815, entitled "An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquake."

M. LEWIS CLARK,
*Surveyor General.*

2. Location of said certificate made by Christian Wilt, dated November 8th, 1816, as follows:

*Location of certificate No. 150.*

[No. 150.]

Christian Wilt, for James Y. O'Carroll, or his legal representatives, enters 640 acres of land, in virtue of a certificate dated November 30th, 1815, and issued by Frederick Bates, esquire, recorder of land titles for the Missouri Territory:

Beginning at the northwesterly corner of what is commonly called and known by the name of the Prairie or Barrier Denoyer tract, or surveys of land, which said tract includes a number of surveys or parcels of land claimed by divers individuals, running from said point of beginning N. 83½ E., with the northerly boundary line of the said Denoyer tract, 320 poles; thence, and from the beginning, N. 6½ W., at right angles, for the quantity of six hundred and forty acres.

CHRISTIAN WILT.

W'm Rector, esq., surveyor, &c. Class No. 25. Nov. 8th, 1816.

OFFICE OF THE SURVEYOR GENERAL,
*Saint Louis, Dec. 21st*, 1850.

I certify that the above is a correct copy, from the original on file in this office, of the notice of location made in virtue of certificate No. 150, issued on the 30th Nov., 1815, by Frederick Bates, recorder of land titles in the Territory of Missouri, pursuant to the act of Congress approved on the 17th February, 1815, entitled "An act for the relief of the inhabitants of the late county of New Madrid who suffered by earthquake."

M. LEWIS CLARKE,
*Surveyor General.*

3. Certificate of Joseph C. Brown, agent of C. Wilt, dated 16 June, 1818:

*Certificate of Jos. C. Brown, agent of C. Wilt.*

Christian Wilt, as the legal representative of James Y. O'Carroll, enters six hundred and forty acres of land by virtue of a certificate, No. 150, dated Nov. 30th, 1815, issued by Fred'k Bates, esq., recorder of land titles, to wit: Fractional section twenty, in township 24 forty-five north, and range seven east, the same in which Saint Louis is situated; that part of fractional section seventeen, in the same township, which lies south of the Cul de Sac Fields; the western half of fractional section twenty-one, in the same township; and so much off from the north side of the western half of fractional section twenty-eight, in the same township, as will make the quantity.

JAMES C. BROWN,
For CHRISTIAN WILT.

ST. LOUIS, 16 *June*, 1818.

I certify that the former location of C. Wilt on the above certificate interfered with the Cul de Sac Fields.

16 June, 1818.

JOSEPH C. BROWN, *D. S.*

OFFICE OF THE SURVEYOR GENERAL,
*Saint Louis, December 21st*, 1850.

I certify that the above is a correct copy, from the original on file in this office, of the notice of location, with the certificate of Jos. C. Brown thereto attached, made in virtue of certificate No. 150, issued on the 30th November, 1815, by Frederick Bates, recorder of land titles in the Territory of Missouri, pursuant to the act of Congress approved on the 17th day of February, 1815, entitled "An act for the relief of the inhabitants of the late county of New Madrid who suffered by earthquakes."

M. LEWIS CLARKE,
*Surveyor General.*

(See plat. Here follows map marked page 31.)

Beginning at a stone, the southwest corner of this tract, in Charles Grattiott's line; thence north 80° 40 east 48 chains to S. Du Breul's corner post in mound; thence south 75 east 86 chains, stone corner in Chouteau's line; thence south 15 west 7 chains 15 links, Chouteau's corner stone; thence south 75 east 44 chains 61 links, post mound in Chouteau's line; thence south 97 chains, post in mound; thence west 27 chains, set post in mound in line of field lands; thence north 6¼ east 78 chains 35 links, stone northeast corner of field lands; thence, with north line of field lands, north 83½ west 113 chains to the beginning.

April, 1818.

JOS. C. BROWN, *D. S.*

OFFICE OF THE SURVEYOR GENERAL,
*Saint Louis, December* 21, 1850.

I certify that the above plat and description of survey No. 2 98, located under New Madrid certificate No. 150, are correctly copied from page 102 of record-book "A" of New Madrid surveys, in this office, interferences not being shown thereon.

M. LEWIS CLARK,
*Surveyor General for Illinois and Missouri.*

25 5. Deed of George Ruddell to James Tanner and Andrew P. Gillespie, dated 7th March, 1816, as follows:

*Deed of Geo. Ruddell to Ja's Tanner and Andrew G. Gillespie.*

On the 17th day of October, 1816, received for record, and the same day recorded, the following deed:

This indenture, made this 7th of March, in the year of our Lord one thousand eight hundred and sixteen, by and between George Ruddell, and Theadocise, his wife, of the county of Larrants, and Territory of Missouri, of the one part, and James Tanner and Andrew P. Gillaspie, of the Territory aforesaid, and county of New Madrid, of the other part, witnesseth: That the said George Ruddell, and Theadocia, his wife, for and in consideration of the full and just sum of five hundred and twenty-five dollars, current money of the United States, to them in hand paid by the said Tanner and Gillaspie at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath this day granted and bargained and sold, and by these presents doth grant *doth grant*, bargain, sell, alian, release, convay, and confirm unto them, the said Tanner and Gillapsie, thare heirs and asines forever, all that tract or parcel of land, of five hundred and fifty arpents of land, situate, leying, and being in the county of New Madrid, and township of Little Prairie, and on the waters of the Mississippi, it being a part *a part* of the said tract of land originally claimed before the United States commissioners of land claims for the Missouri Territory, by and in the name of James Y. O'Carroll, as reference being had to the records of the record office, or fu land laims for the Missouri Territory, which said tract of land has been materially injured by earthquakes; and whereas, under the act of Congress of the United States of the 17th day of February, 1815, it is provided that person or persons owning lands in the county of New Madrid thus injured by earthquake shall be entitled to locat certain quantities of land of the United States, which they shall hold in lieu of ther injured, which injured shall revert to and become absolutely vested in the United States, all the privileges and benefits given to the said Garge Ruddell, and Theadocia, his wife, by said act of Congress, which said claim has been regularly transferred to the said George Ruddell, his heirs, *hars*, and assigns. And the said George Ruddell, Theadocia, his wife, are hereby sold and transferred to the said Tanner and Gillaspie, thare heirs and assigns forever: To have and to hold the said tract or parcel of land, together with all and singular the privileges and appurtenances thareonto belonging, unto them, the said Tanner and Gillaspie, and their heirs and assigns forever. And the said George Ruddle, Theadocia, his wife, covenant and agree to warrent and forever defend the said bargained and sold premises, together with the preveleges and appertenances aforesaid, unto them, the said Tanner and Gillaspie, and their heirs and assigns, free from all claims, demands, or incumbrances of whatsoever nature.

26 Witness our hands and seals the day and year first above written.

GEORGE RUDDELL. [SEAL.]

THEADOSSHETH her + mark. RUDDELL. [SEAL.]

Signed, sealed, and delivered in presence of—

JONATHAN CHANDLER.

GEORGE WEST.

This day appeared before me, the undersigned, one of the justices of the peace in and for the county of Larran, and Territory of Missouri, the within named and signed George Ruddell, and Theodocia, his wife, and acknowledge the within deed to be thare act and deed, hand and seal, for the use and purpauses therein mentioned.

Given under my hand this 7th day of March, 1816.

GEO. WEST, *J. P.*

STATE OF MISSOURI, *County of New Madrid, ss:*

I, Richard H. Hatcher, clerk of the circuit court and ex officio recorder in and for the said county of New Madrid, do hereby certify that the above and foregoing is a true, full, and complete transcript of the original record of the deed from George Ruddell and wife to James Tanner and Andrew P. Gillaspie, together with the certificates of acknowledgement and record of same, as fully as the same appear of record in book eight, pages 116 and 117, of the record of said county.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the town of New Madrid, this 1st day of October, A. D. 1856.

[SEAL.] RICH'D H. HATCHER, *Clerk.*

To the given of which in evidence plaintiff objected; but the court admitted it, and plaintiff excepted.

6. Deed of George Ruddell to George Dameron, dated November 1st, 1815, as follows:

*Deed of Geo. Ruddell to Geo. Dameron.*

Received 3d day of Nov., 1815, and recorded the same day:

This indenter, made this first day of November, A. D. eighteen hundred and fifteen, by and between George Ruddell, of the county of Larrance, and Territory of Missourie, of the one part, and George Dameron, of the county of New Madrid, and Territory aforesaid, of the other part, witnesseth: That the said George Ruddell, for and in consideration of the sum of four hundred dollars, current money of the United States, to him in hand paid by the said George Dameron at or before the delivery of these presents, the receipt whereof is hereby acknowledged, he this day hath granted, bargained, and sold, and by the said George Dameron, his heirs, executors, administrators, or assigns forever,
27 a certain part of a tract or parcel of land of two hundred arpens, situated in the Little Prararie Township, lying and being in the county of New Madrid, and Territory of Missouri, and about two and a half miles from the village of Little Prairaire, and adjoining part of the same tract, sold by the said Ruddell to a certain William Raegerson, the lower side down a *byo*, (bayou,) and known by the name of James Young O'Carroll head right, which said tract of land has been materially injured by earthquakes; and whereas, under the act of Congress of the United States of the 17th of February, 1815, it is provided that all and every person or persons owning land *land* in the county of New Madrid, in the Territory of Missouri, thus injured by earthquakes, shall be entitled to the rights, priveilages, to be located, certain quantities of public lands, which they shall hold in liue of their injured lands, which injured lands shall revert to, and become absolutely vested in, the United States. All the rights, privileges, and benefits which are given

to the said George Ruddell, by the said act of Congress, in virtue of the aforesaid tract of land, are hereby sold and transferred by the said George Ruddell to the said George Dameroon, his heirs and assigns, forever: To have and to hold the said tract of land aforesaid, together with all and singular the privileges and appurtenances thereunto belonging, unto him, the said George Demoron, his heirs and assigns, forever. And the said George Ruddell hereby covenants and agrees to warrant and forever defend the said bargained and sold premises, together with the privaleges and appurtainances aforesaid, unto him, the said George Dameron, against the claim or claims of him, the said George Ruddell, his heirs, executors, and administrators, or against the claim or claims of every person or persons claiming by, through, or under him, the said George Ruddell.

In witness whereof I have hereunto set my hand and affixed my seal the day and date first above written.

GEORGE RUDDELL. [SEAL.]

Signed, sealed, and delivered in the presence of us:
STEPHEN ROYS.
SAM. BALDWIN.
JOHN I. HACHER.

TERRITORY OF MISSOURI, *County of New Madrid, set:*

Be it remembered that, on the first day of November, A. D. eighteen hundred and fifteen, personally came and appeared before me, the undersigned, a justice of the peace in and for the county of New Madrid, the above-signed George Ruddle, and acknowledged the above and within deed to be his act and deed, hand and seal, for the use and purpose therein mentioned and contained.

Given under my hand this day and date above written.

JOHN SHRODER, *J. P.*

I, Alphonso Dalarodie, clerk of the circuit court and ex-officio
28 recorder for the county of New Madrid, in the State of Missouri, do hereby certify the foregoing to be a true and correct copy from the record in my office of the deed of George Ruddell to George Dameron, and of all things appertaining to the same now of record in book No. 6, page 9, and of New Madrid County record.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the town of New Madrid, the 30th day of December, A. D. 1847.

[L. S.] ALPHO. DELARODIE, *Clerk.*

To the giving of which in evidence plaintiff objected, but the court admitted it, and plaintiff excepted at the time.

7. Deed of George Ruddell and wife, Andrew P. Gillaspie, dated the 16th day of May, 1818, as follows:

*Deed of Geo. Ruddell and wife to Andrew P. Gillaspie.*

On the 8th day of June, 1818, received for record, and the same day recorded, the following deed:

This indenture, made and concluded upon this 16th day of May, in the year of our Lord one thousand eight hundred and eighteen, by and between George Ruddell, and Theodochy, his wife, of the county of

Lawrence, and Territory of Missourie, of the one parte, and Andrew P. Gillaspie, of the count of New , and Territory aforesaid, of the other part, witnesseth: That for and in consideration of the full some of five hundred dollars, to them in hand paid by the said Andrew P. Gillaspie, the receipt of which payment is hereby acknowledged by the said George and wife, and he, the said George and wife, hath this day granted, bargained, and sold, and do by these presants give, grant, bargain, and set over to him, the said Gillaspie, them tracts of land, parcels of land, situate in the county of New Madrid, and in the Little Perrarie Township, one tract of two hundred arpents, situated on the Mississippi, or near the Mississippi, et being a parte of James Y. O'Carroll settlement right; also two lots in the little village, granted to John or Jean Montmeine: To have and to hold all right, title, interest, and clame, be the same more or less, of him, the said George and wife, to the said Andrew P. Gillaspie, his heirs or assigns, forever. And the said Gillaspie, being well acquainted with the situation of the above-described tract and lots of land, takes the same at his own risk and hazzard.

Given under our hands and seals this day and date first above ritten.

GEORGE RUDDELL. [SEAL.]

her
THEODOSHETH + RUDDELL. [SEAL.]
mark.

Signed, sealed, and delivered in preasants of us:
JOHN TANNER and
ABRAHAM RUDDELL.

29 TERRITORY OF MISSOURI, *County of New Madrid, set:*

I, Richard Sessum, justice of the peace within and for the county of New Madrid, do hereby certify that James Tanner personally appeared before me this day, and made oath on the Holy Evangels of Almighty God that he saw George Ruddell and Theodosea Ruddell sign, seal, and deliver, and heard them acknowledge, within deed of conveyance to be their act and deed, hand and seal, for the use and purposes therein expressed, and that Abraham Ruddell signed the same as witness in his presence.

Given under my hand at office May 26th, 1818.

RICHARD SESSAN,
*Justice Peace.*

STATE OF MISSOURI, *County of New Madrid, ss:*

I, Richard H. Hatcher, clerk of the circuit court and ex-officio recorder in and for the county of New Madrid, in the State of Missouri, do hereby certify that the foregoing is a true, full, and complete transcript of the record of a deed from George Ruddell and wife to Andrew P. Gillaspie, together with the certificate of the proof of acknowledgment of same, and the certificate of record of same, as the same appear of record on pages seventy-three and seventy-four of book number ten of the record of said county.

In witness whereof I hereunto subscribed my name and affixed the seal of said court, at office, in the town of New Madrid, this 18th day of March, A. D. 1858.

[L. S.] RICHARD H. HATCHER,
*Clerk and Ex-officio Recorder.*

To the reading of which in evidence the plaintiff objected, but the court overruled his objection, to which plaintiff at the time excepted.

8. Deed of Andrew P. Gillaspie to James Tanner, dated the 17th October, 1816, as follows:

*Deed of Andrew P. Gillaspie to James Tanner.*

On the 18th of October, 1816, received for record, and the same day recorded, the following deed:

Know all men by these presents that I, Andrew P. Gillaspie, of the county of New Madrid, and Territory of Missouri, have this day granted, bargained, and sold, and by these presents doath give, grant, bargain, and set over to James Tanner, of the county and Territory aforesaid, all my right, title, interest, and clame of James Y. O'Carroll, and also the clame of John Baker, signr, ot two hundred and fifty arpents, and the clame confirmed to the said Baker under George Morgin, which said clame, or a part of them, ware bought in pardnership by the said Andrew P. Gillaspie and said James Tanner; and he, the said Gillaspie, for and in consideration of one hundred and ninety dollars, to him in hand pade by the said James Tanner, for which he, the said Gil-
30 laspie, do agree to warrant and forever defend the clame that is in him against himself, his heirs, or executors, or against any person whatsoever.

Given under my hand and seal this 17th day of October, 1816.

ANDREW P. GILLASPIE. [SEAL.]

Test:

RICHARD H. WATERS.
RICHARD SESSEN.

TERRITORY OF MISSOURI, *County of New Madrid, ss:*

Be it remembered that, on the 18th day of October, in the year eighteen hundred and sixteen, personally came and appeared before me, Richard H. Waters, clerk of the circuit in and for the county of New Madrid, the within-signed Andrew P. Gillaspie, party grantor to the within instrument in writing, and acknowledged the same to be his free and volutary act and deed, hand and seal, for the use and purposes therein expressed.

In testimony whereof, there being no judicial seal yet procured to said court, I have hereunto subscribed my name and affixed my own private seal the day and date above written.

RICHARD H. WATERS, *Clerk.*

STATE OF MISSOURI, *County of New Madrid, ss:*

I, Richard H. Hatcher, clerk of the circuit court, and ex-officio recorder, within and for the county of New Madrid, in the State of Missouri, do hereby certify that the foregoing is a true, full, and complete transcript of a deed from Andrew P. Gillaspie to James Tanner, together with the certificates of acknowledgment and record of same, as fully as the same appear of record in book eight, page 122 and 123, of the record of said county.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the town of New Madrid, this 19th day of March, A. D. 1858.

RICH'D H. HATCHER, *Clerk.*

To the giving of which plaintiff objected, but the court admitted the same, to which the plaintiff excepted.

9. Deed of Andrew P. Gillaspie to James Tanner, dated 1st June, 1818, as follows:

*Deed of Andrew P. Gillaspie to James Tanner.*

This indenture, made this 1st day of June, 1818, by and between Andrew P. Gillaspie, of the one part, and James Tanner, boath of the county of New Madrid, and Territory of Missouri, and he, the said Andrew P. Gillaspie, for and in consideration of the just and full some of ten dollars, to him in hand paid by the said James Tanner, the receipt of which payment is hereby acknowledged by the said Gillaspie, and he, the said Andrew P. Gillaspie, has this day granted, bargained, and sold unto him, the said James, his heirs or assigns forever, all them
31 tracts or parcels of land, one tract of two hundred arpens, a parte of the settelment right of James Y. O'Carroll, situate in the county of New Madrid, and township of Little Perrarie; also two lots situate in the village of Little Perrarie, granted to John or Jean Montgmeny, convaid by the said Montmeny to George Ruddell, and convaid by the said George and wife to the said Andrew P. Gillaspie. And he, the said James Tanner, being well acquainted with the said tract of two hundred arpens and the said two lots, takes the same at his own risk and hazzard.

Given under our hands and seals this day and date first above written.

ANDREW P. GILLASPIE. [SEAL.]
JAMES TANNER. [SEAL.]

Signed in preasants of—

TERRITORY OF MISSOURI, *County of New Madrid, sct:*

I do hereby certify that Andrew P. Gillaspie and James Tanner personally appeared before me, a justice of the peace in and for the county of New Madrid, and acknowledged the within and foregoing deed of conveyance to be their act and deed, hand and seal, for the use and purposes therein contained.

Given under my hand, at office, June the first day, in the year eighteen hundred and eighteen.

RICH'D SESSUMS,
*Justice Peace.*

STATE OF MISSOURI, *County of New Madrid, ss:*

I, Richard H. Hatcher, clerk of the circuit court in and for said county of New Madrid, hereby certify that the foregoing is a true, full, and complete transcript of the original record of a deed from Andrew P. Gillaspie to James Tanner, with the certificate of acknowledgment of same, as fully as the same remains of record in my office in book ten, page seventy-five, of the records of said county.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the town of New Madrid, this 1st day of October, A. D. 1856.

[L. S.] RICHARD H. HATCHER, *Clerk.*

10. Deed of James Y. O'Carroll to George Ruddell, dated 29 November, 1805, as follows:

*Deed of Ja's Y. O'Carroll to Geo Ruddell.*

On the 18th day of March, 1809, the following deed of sale was presented to be, and was, recorded the same day:

This indenture, made this twenty-ninth day of November, in the year

of our Lord one thousand eight hundred and five, by and between James Young O'Carroll, of the township of the Little Prairie, in the district of New Madrid, and Territory of Louisiana, of the one part, and George Ruddell, of the township, district, and Territory aforesaid, of the other part, witnesseth: That for and in consideration of the sum of four
32 hundred dollars, to him in hand paid, the receipt whereof is hereby acknowledged, and the said George Ruddell, his heirs, executors, &c., for our discharge, exonerate and acquitted the said James Young O'Carroll, hath granted, bargained, alienued, conveyed, and confirmed, and doth by the present grant, bargain, sell, alien, release, convey, and confirm, to the said George Ruddell, his heirs and assigns forever, all that tract, parcel, or parcels of land situate near the Mississippi, about two miles above the village of the Little Prairie, it being the settlement right of the said James Young O'Carroll under the second section of the law of Congress within the district of Louisiana, and the Territory of Orleans, and every part, parcel, acre, or arpent thereof, which may be confirmed to him, the said James Young O'Carroll, by the commissioners of the United States, or by the United States in Congress assembled, are hereby conveyed, bargained, and sold to the said George Ruddell, together with all the appartenances thereto belonging or in any wise appertaining, and all the rights, interest, and estate of him, the said James Young O'Carroll, is hereby bargained, sold, and transferred to the said George Ruddell forever. Moreover, the said James Young O'Carroll doth agree for himself and his heirs, &c., to and with the said George Ruddell, his heirs and assigns, that he will warrant and defend the same land and *and* premises against the lawful claim of any person, and every and all persons, through, by, or under him.

In witness whereof the James Young O'Carroll hath hereunto set his hand and affixed his seal this day and date first above mentioned.

his
JAMES Y'G + O'CARROLL. [SEAL.]
mark.

Signed, sealed, and delivered in presence of us—
FRANCIS LESIEUR and
M. AMOURAUX.

Received, on the day of the date of the within conveyance, the within-mentioned sum of four hundred dollars, it being the consideration money as aforesaid.

his
JAMES Y'G + O'CARROLL.
mark.

Test:
JAMES HUMPHREYS.
M. AMOURAUX.

DISTRICT OF NEW MADRID, *set:*

On the 29th day of November, 1805, personally appeared the within-signed James Young O'Carroll before me, M. Mitchell Amoureux, a justice of the court of common pleas of said district, and acknowledged the within instrument to be his act and deed; all the lands and premises therein mentioned to be conveyed to the within-mentioned George Ruddell and his heirs and assigns forever.

M. AMOUREUX, *J. C. P.*

I, Alphonso Delarderie, clerk of the circuit court, and ex-officio recorder for the county of New Madrid, in the State of Missouri, do hereby certify the foregoing to be a true and correct copy from the records in my office of the deed of James Young O'Carroll to George Ruddell, and of all that appertains to the same, now of record in book No. 3, pages 37, 38, of New Madrid County record.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the town of New Madrid, the 30th day of December, A. D. 1847.

[L. S.] ALP. DELARODERIE, *Clerk.*

To the reading of which in evidence plaintiff objected, because it had not been filed for record within a year from its date; and thereupon defendants read the deposition of Michael Branham, as follows:

*Deposition of Michael Branham.*

MICHAEL BRANHAM, of lawful age, being sworn and examined on the part of defendants, deposeth and saith:

Question by defendants. What is your age, name, and where do you reside?

Answer. My name is Michael Branham; my age, as well as I am informed, is (93) ninety-three years; I reside in Dunklin County, in the State of Missouri.

Question by defendants. Did you ever know James Y. O'Carroll, of Little Prairie Township, in the county of New Madrid, in the State of Missouri? If you knew him, state where, when, and how long you knew him.

Answer. I came to the county of New Madrid, State of Missouri, I think, about sixty years ago; would say about the year A. D. 1802. At that time James Y. O'Carroll was living in the county of New Madrid, township of Little Prairie, now State of Missouri, on or near the Mississippi River, three or three and a half miles above the village of Little Prairie; he continued to reside in Little Prairie Township for two or three years after I first knew him; he then left the country, and I never saw or knew of him after that time.

Question by defendant. Did James Y. O'Carroll own or occupy any land? If so, where was it situate, and what was its extent or area in arpens?

Answer. O'Carroll owned or occupied land, as before stated, three or three and a half miles above the village of Little Prairie, which, I understood, he claimed by virtue of a permit or settlement right from the Spanish government; but what quantity owned or claimed I do not know.

Question by plaintiff. Did you ever know or hear of O'Carroll possessing or owning any other settlement in the county of New Madrid than the one known as his in Little Prairie Township?

Answer. I knew of his owning or claiming no other place or land than that before mentioned by me.

Question by defendants. How did the land occupied or claimed
34 by O'Carroll, and known as the O'Carroll settlement right, front east, and how it run for quantity?

Answer. It fronted east on the Mississippi River, or as near as could be, as I understood the Spanish government reserved along the banks of the river a highway. I cannot state how it ran as to quantity.

Question by defendant. Was there any bayou near said tract of land, or running through it?

Answer. Not knowing the boundary of the tract of land, cannot state definitely. There was one bayou running into the Mississippi River, about a mile and a half above the place known as the O'Carroll improvements, and another that entered the river about a mile below said improvement, and one other back or west of the said improvement some two miles; but whether either of said bayous run through said tract of land or not I cannot state.

Question by defendant. You state there was one bayou above and one below, and one west of the O'Carroll improvement. Can you state definitely whether or not, within the boundary described by these three bayous, there was any bayou?

Answer. There may have been, and I think there were, several sloughs; but nothing that we called a bayou.

Question by defendants. Had James Y. O'Carroll a wife and children? If he had children, how many?

Answer. O'Carroll had a wife and some children, but how many children I do not recollect.

Question by defendant. Did O'Carroll sell said land to any one? If so, to whom and when?

Answer. O'Carroll sold said tract of land to George Ruddell; I can't state the date of the sale, but the land was claimed by George Ruddell after O'Carroll left the country, which was, I think, in the year 1805 or 1806.

Question by defendant. Did you ever know George Ruddell, who bought the O'Carroll tract of land, and where he was from?

Answer. I knew George Ruddell, that bought said land, well; I lived with him several years; he was formerly from Lexington, in the State of Kentucky; at least, I have so heard him say.

Question by defendant. Did George Ruddell ever live on said O'Carroll tract of land?

Answer. I cannot say that he did or did not live on the tract; but he never lived on the place known and called the O'Carroll improvement.

Question by defendant. How near to said O'Carroll improvement did George Ruddell live, and in what direction?

Answer. Some two miles, in a westerly direction.

Question by defendant. Was there a bayou near where George Ruddell lived?

Answer. The place George Ruddell lived on (stated in my last answer as above) was immediately on the bank of a bayou; there was, I think, no other bayou near the place.

Question by defendants. On what part of the tract of land was the O'Carroll improvement situate?

35 Answer. I cannot say on what part of the tract the improvement was, only by stating that the improvement was some three or three and a half miles above the village of Little Prairie, and within two or three hundred yards of the bank of the Mississippi River.

Question by defendants. Was there any other settlement right in Little Prairie Township known as the O'Carroll settlement right than the one before mentioned and described by you?

Answer. I never knew or heard of any other.

Question by defendants. Did Ruddell sell the O'Carroll tract, or any part of it? If he did, state to whom sold, and what part of it.

Answer. I do not know that Ruddell ever sold any part of said land.

Question by defendants. Did you ever know George Dameron?

Answer. I never did, as I now recollect.

Question by defendants. Do you know all the children of George Ruddell, of Kentucky? If so, state their names.

Answer. I knew them all; their names are Abraham, Isaac, George, John, Cornelius, Elizabeth, Sarah, and Rebecca.

Question by defendants. Did you ever know any other George Ruddell in Little Prairie Township than George Ruddell, of Kentucky, and his son George?

Answer. I knew no other than the two mentioned.

Question by defendants. Did you ever know or hear of more than one settlement right in New Madrid County known as the O'Carroll settlement right?

Answer. I know of no other than the one before mentioned, anywhere or any place.

Question by defendants. How long did you live in Little Prairie Township; from what year to what year?

Answer. I lived in Little Prairie Township from about 1801 to 1820, with the exception of about one year, which I think was the year 1813.

Question by defendants. Were you acquainted with the settlers in the Little Prairie Township from 1801 to 1820?

Answer. I knew all the settlers of said township within the time named, that is, unless it might be some one who remained in the township but a few days I did not know.

Question by defendants. Did you know of the O'Carroll tract of land being injured by earthquakes in the year 1811 or 1812?

Answer. I think the land was so injured.

And further deponent sayeth not.

MICHAEL his + mark. BRANHAM.

And the court admitted said deed to be read.

36 11. Deed of Rachel Dameron and als. to James Tanner, dated October 2d, 1818, as follows:

*Deed of Rachel Dameron to Ja's Tanner.*

On the 18th day of October, 1816, received for record, and the same day recorded, the following deed:

This indenture, made and concluded upon the 2d day of October, in the year of our Lord one thousand eight hundred and sixteen, by and between Rachel Dameron and William Nelson and John Dameron, the legal representatives and heirs of Georg Dameron, deceased, residenters of Warren County, Tennessee, of the first part, and James Tanner, of the county of New Madrid, and Territory of Missouri, of the second part, witness: That for and in consideration of one hundred dollars, lawful money of the United States, to them in hand paid by the said James Tanner at and before the sealing and delivering of this presents, the receipt of which is hereby acknowledged, have this granted, bargained, and sold, and by these presents doth grant, bargain, sell, ailen, set over, and release, to the said James Tanner or assigns forever, all that tract of two hundred arpints of land situate in the county New Madrid, in the township of Little Prairie, it being a part of the settlement right of James Y. O'Carroll, which has been conveyed by the said O'Carroll to George Ruddell, and conveyed by George Ruddell to the said George

Dameron, deceased; now, the said Rachel Dameron and William Nelson and John Dameron, the legal heirs and representatives of Georg Dameron, deceased, for themselves, their heirs and administrators, doth agree to and with the said James Tanner, his heirs and assigns forever, that they will forever warrant and defend all thare rights to the above described tract of land, free from any incumbrances whatever.

Given under our hands and seals this day and date first above written.

RACHEL her + mark. DAMERON.

WILLIAM his + mark. WILSON.

JOHN DAMERON.

Signed, sealed, and delivered in presence of us:

E. N. MATTHEWS.

ANDREW P. GILLASPIE.

TERRITORY OF MISSOURI, *County of New Madrid, ss:*

Personally came and appeared before me, Rich'd H. Waters, clerk of the circuit court in and for the county aforesaid, the within-signed Andrew P. Gillaspie, one of the subscribing witnesses to the within instrument of writing, and made oath on the Holy Evangels of
37 Almighty God that he saw the within-named Rachel Dameron, William Nelson, and John Dameron, sign, seal, acknowledge, and deliver the within instrument in writing to be their hand and seal, act and deed, for the purposes therein expressed.

Given under my hand and probate seal the day and date above written.

[SEAL.] RICH'D H. WATERS, *Clerk.*

STATE OF MISSOURI, *County of New Madrid, set:*

I, John A. Mott, clerk of the circuit court, and ex-officio recorder in and for the county of New Madrid aforesaid, do hereby certify the foregoing is a full and complete copy of the record of deed and certificate from Rachel Dameron, William Nelson, and John Dameron to James Tanner, as the same now appear of record in book No: 8, folio 125 and 126, of the record of said county, now in my office.

In witness whereof I hereunto sign my name and affix the seal of said court, at office, this 30th day of July, 1863.

[L. S.] JOHN A. MOTT,
*Clerk and Ex-officio Recorder.*

12. Deed of James Tanner to Christian Wilt, dated 31 , 1818, as follows:

*Deed of Ja's Tanner to Christian Wilt.*

This deed and covenant, made and entered into by and between James Tanner, of the county of New Madrid, in the Missouri Territory, of the one part, and Christian Wilt, of the town and county of St. Louis, in the same Territory, of the other part, witnesseth: That the said James Tanner, for and in consideration of the sum of twelve hundred and eighty dollars, current money of the United States, to him in *had* paid by the said Christian Wilt, the receipt of which payment is hereby acknowledged, has granted, bargained, and sold, and does by these pres-

ents grant, bargain, and sell, to the said Christian Wilt, and to his heirs and assigns forever, six hundred and forty acres of land, with the right and privilege of locating the same according to the provisions of an act of Congress of February 17th, 1815, for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes; the land, and claim thereto, hereby sold and conveyed being six hundred and forty acres, then rightfully and lawfully owned and belonging to James Y. O'Carroll, since that time conveyed by good claim of title to the said James Tanner, who, as legal representative of the said O'Carroll, has accepted the relief offered by the said act of Congress, and procured from the recorder of land titles a certificate, No. 150, authorizing the said James Y. O'Carroll, or his legal representatives, to locate the said six hundred and forty acres on any of the public land of said Territory, the sale of which is authorized by law. And the said James Tanner, legal representative of the said James Y. O'Car-
38 roll, does hereby authorize and empower the said Christian Wilt to locate the said six hundred and forty acres of land accordingly; and the said James Tanner, for the consideration aforesaid, hereby covenants with the said Christian Wilt that he, the said James Tanner, his heirs and representatives, will warrant and forever defend the right and title of the said six hundred and forty acres of land, wheresoever the same may be located as aforesaid, accordind to the lines and boundaries thereof, as the same may be established by *by* final survey to him, the said Christian Wilt, his heirs and assigns, in fee-simple forever, together with all and singular of the premises, apperteanances, benefits, and advantages thereunto in any wise belonging: To have and to hold the said claim, and six hundred and forty acres of land, with the premises aforisaid, to him, the said Christian, with his heirs and assigns forever, free and clear off and from all and all manner of adverse titles or claims to the same or any part thereof, and free and clear off and from all and every kind of embarrassment whatsoever. And the said James Tanner, for the aforesaid consideration, hereby further covenants with the said Christian Wilt, that he, the said James Tanner, his heirs or representatives shall, and will at any time when thereunto requested by the said Christian Wilt, his heirs and assigns, after the said claim shall be located as aforesaid, and final survey thereof made and boundaries established, make to him, the said Christian Wilt, his heirs and assigns, a new general warrantee deed, describing the particular land on which the said claim may be located as aforesaid, by the lines, courses, distances, and boundaries thereof, as the same may be established by final survey.

In testimony whereof the said James Tanner has hereunto set his hand and seal, at St. Louis, this thirty-first day of , in the year 1816, [1818.]

[SEAL.] JAMES TANNER.

The word on the 2 line of the other page interlined before signing. Signed, sealed, and delivered in presence of—

JOHN C. SULLIVAN.
GEORGE WILSON.

MISSOURI TERRITORY, *County of St. Louis, sct:*

Be it remembered that, on the day and date of the within instrument in writing, before me, Mary Philip Leduc, clerk of the circuit court within and for the county aforesaid, personally came and appeared the within-named James Tanner, and acknowledged the within instrument

in writing to be his act and deed, hand and seal, for the purpose therein contained.

In witness whereof I have hereunto set my hand and seal, day and date, above said.

[L. S.] M. P. LUDUC, *Clerk.*

Recorded this 25th March, 1819.

A. GAMBLE, *Clerk.*

39 STATE OF MISSOURI, *County of St. Louis, ss:*

I, the undersigned, recorder for said county, certify that the foregoing is a true copy of a deed from James Tanner to Chr'n Wilt, the certificate of acknowledgment, and the date of recording, as fully as the same remains of record in my office in book H, page 237.

Witness my hand and official seal this 4th day of May, 1863.

[L. S.] A. C. BERNOUDY, *Recorder,*
Per J. CONRAD, *Deputy.*

[And stamp.]

13. Deed of Hempstead, as guardian of George W. Wilt, only son and heir of Christian Wilt, to Joseph Hertzog, surviving partner, dated September 10th, 1821, as follows:

*Deed of Hemstead, guardian of Geo. W. Wilt, to Jos. Hertzog.*

This indenture, made this tenth day of September, in the year one thousand eight hundred and twenty-one, between Charles S. Hemstead, guardian of George Wilson Wilt, infant son and only heir of the late Christian Wilt, deceased, of the town and county of St. Louis, of the first part, and Joseph Hertzog, surviving partner of the late firm of Christian Wilt, deceased, of the second part, witnesseth: That whereas said Joseph Hertzog, a survivor partner as aforesaid, did file his bill in the St. Louis circuit court, setting as a court of chancery, to cause to be conveyed to him, said party of the second part, as surviving partner as aforesaid, by the said Charles S. Hempstead, as guardian as aforesaid, certain real estate situate in the county aforesaid, which had been burchased for and account of said firm by the said Christian Wilt; and whereas the said circuit court, at the present August term thereof, upon the bill aforesaid and the answer of said guardian, did order and decree that the *the* real estate hereinafter particularly described should be transferred and assigned by the said guardian, party of the first part, to the said Joseph Hertzog, as surviving partner of the aforesaid firm, and to and for the sole use and benefit of said firm, all which will and may more fully and at large appear by the said proceedings and decree now remaining of record in the said circuit court: Now know ye that I, the said Charles S. Hemstead, as guardian of said George Wilson Wilt, infant son and heir aforesaid, in pursuance of and by virtue of the power and authority in me vested by said decree, do hereby transfer, release, assign, and set over to said Joseph Hertzog, as surviving partner of said Christian Wilt, deceased, and to his assigns, the following real estate, situate, lying, and being in the county aforesaid, and mentioned and described in said decree, to wit: All that certain lot or parcel of ground, situate in the town of Saint Louis, containing the quantity of one hundred and fifty feet, more or less, in depth, bounded in front and westwardly by First Main street, which separates it from the lot formerly of Emiline Yosty; northwardly by a cross street, which

separates it from the lot of Andre Landreville; south by the lot
40 of Gabriel Paul; and eastwardly by the river Mississippi; on which said lot there is a large brick store and dwelling-house, stone factory, and other buildings, and which is the same lot acquired by the said Christian Wilt from Edward Hemstead, Pierre Chouteau, sen'r, and Mad'me V. Hebert, as may more fully and at large appear by reference to the deed from said Edward Hemstead and wife, dated August 1st, 1811, and recorded in the office of the recorder of St. Louis County aforesaid, book C, pages 457 and following, and to the deed from said Pierre Chouteau, sen'r, and wife, dated September 22d, 1812, and recorded in the same office, book D, pages 66 and following, and to the deed of said Mad'me Hebert, dated June 1st, 1812, and recorded in the same office, book C, pages 573 and following. Also all that certain other lot and piece of ground, situate, lying, and being in the said town of St. Louis, containing the quantity of sixty feet front by one hundred and fifteen feet, more or less, in depth, bounded eastwardly and in front by said First Main street, northwardly by the lot of Michael Rollette, westwardly the lot now or formerly of Francis and Joseph Robidoux, and southwardly by the lot of the estate of Francis M. Benoist, deceased, upon which said lot is a brick dwelling-house and a soap and candle factory, it being formerly the property of Joseph Henderson, and as such purchased by said Christian Wilt at sheriff's sale, all which may more fully appear by reference to the deed therefor recorded in the office aforesaid, book H, pages 471 and following. Also all that certain other part or parcel of ground situate, lying, and being in the town of St. Louis aforesaid, containing the quantity of thirty feet front by one hundred and fifty feet deep, bounded eastwardly and in front by said First Main street, southwardly by the lot formerly of Louis Latour neaw, northwardly by the lot now of Thomas Forsyth, and westwardly by ground formerly of William C. Carr, and which lot was purchased by said Christian Wilt from Louis Latourneaw by deed dated June 19th, 1816, and recorded in the same office, book E, page 515 and following. Also the one equal undivided moiety or half of a certain tract or parcel of land, situate and lying in the country aforesaid, containing the quantity of two hundred and four acres, bounded northwardly by lands of General D. I. Bissell and the late William Massey, and southwardly by the lands of Anthony Soulard, it being the same tract of land purchased by said Christian Wilt from Simon Bruster, by deed dated May 12th, 1818, and recorded in the same office, book G, pages 302 and following, as may more fully and at large appear. Also all that certain tract or parcel of land, situate, lying, and being in the same county, about three and a half miles southwest of the town of Saint Louis, containing the quantity of six hundred and forty acres; for the boundaries thereof reference is made to the location thereof by Jos. C. Brown, deputy surveyor, for said Christian Wilt, in the office of United States surveyor for Missouri and Illinois, the same having been located by virtue of a certain certificate, commonly a New Madrid claim, the number whereof was "150," and dated November 30th, 1815,
41 granted in favor of James Y. O'Carroll and his legal representatives, which said certificate was sold and conveyed to said Christian Wilt by James Tanner, by deed dated in the year 1816, and recorded in the same office, book H, pages 237, '8, and '9, all of which will more fully and at large appear by reference to said location certificate and deed aforesaid: To have and to hold the above-described premises, with all and singular the rights, privileges, and appurtenances thereunto in any wise belonging, unto him, said Joseph Hertzog, as surviv-

ing partner of the late firm of Christian Wilt, and to his only and proper use, benefit, and behoof, as surviving partner as aforesaid, and his heirs and assigns forever. And it is further declared, covenanted, and agreed, by and between the said Charles S. Hemstead, as guardian as aforesaid, and the said Joseph Hertzog and his heirs, executers, administrators, and assigns, that the said several premises hereinbefore conveyed and described are only to be disposed of and sol, or bargained among, for, and on account of the said firm of Christian Wilt, either in payme[—], security of, or discharge of its debts, or in closing its concerns according to the true intent [——] meaning of the bill and proceeding in and oroler and decree of said court as aforesaid, and n[——] is herein again referred to for that purpose.

In testimony whereof I, the said Charles [——] Hemstead, as guardian as aforesaid, have hereunto set my hand and affixed my seal, at St. [——], the day and year first hereinbefore written.

The words "by said decree" interlined between the 23 and 24 lines of the first page and approved of before signing.

CHARLES S. HEMSTEAD, [SEAL.]
*Guardian of G. W. Wilt.*

Signed, sealed, and delivered in presence of—

STATE OF MISSOURI, *County of St. Louis, ss:*

This day personally appeared before me, clerk of the circuit court for the county of St. Louis, the above-named Charles S. Hemstead, and acknowledged the above and foregoing deed or instrument in writing by him signed as guardian, and to his deet and deed, hand and seal, for the purpose therein mentioned.

Given under my hand and seal, at office, at St. Louis, this 13th day of September, 1821.

[L. S.] ARCHIBALD GAMBLE, *Clerk.*

Recorded this 13th day of September, 1821.

Note by recorder.—Words or parts of words marked [——] defaced in original record.

STATE OF MISSOURI, *County of St. Louis, ss:*

I, the undersigned, recorder for said county, certify that the foregoing is a true copy of a deed from Charles S. Hemsead, guardian of George W. Wilt, to Jos. Hertzog, the certificate of acknowledgment, and the date of recording, as fully as the same remains of record in my office in book K, page 316.

Witness my hand and official seal this 4th day of May, 1863.

[L. S.] A. C. BERNOUDY, *Recorder,*
By J. CONRAD, *Deputy.*

[U. S. stamp.]

42 14. Transcript of record, proceedings, and decree of August, 1821, of the St. Louis circuit court, in the case of Hertzog vs. Wilt, as follows:

*Record and proceedings in Hertzog vs. Wilt.*

To the honorable the circuit court in and for the county of St. Louis, sitting as a court of chancery:

Complaining unto your honorable court, your orator, Joseph Hert-

zog, at present of the town and county of St. Louis, and within the jurisdiction of this court, sheweth: That in the month of June, in the year one thousand eight hundred and eleven, your orator, then residing in the city of Philadelphia, agreed with Christian Wilt, his nephew, and who he had raised in his store, then residing at St. Louis, but since deceased, to form a partnership in the trade and business of selling merchandise in the then Louisiana Territory, and also in whatever other business they might choose to pursue in said Territory, the terms of which partnership were these: Your said orator was to furnish all the capital, purchase the goods at Philadelphia and elsewhere at the eastward, attend to the transportation of the same, and in general to perform all things which might be necessary and proper as a partner residing at the eastward; the said Christian Wilt, on his part, was to reside at and superintend all the business of the concern at St. Louis and elsewhere, in said Territory, for which he was to have and receive one-third of the profits and suffer one-third of the losses; that, in pursuance of this understanding and agreement, it was further consented by your orator that the name and style of the firm might be as the said Christian Wilt might deem fit, who thereupon adopted the style of "Christian Wilt," under which name and firm they commenced business at St. Louis and elsewhere, in the now State of Missouri, and continued with much success until the fall of 1818, when the said partner agreed to take into their said firm, at St. Louis, Andrew Wilt, the brother of said Christian Wilt.

And your orator further sheweth: That, during the partnership of "Christian Wilt" aforesaid, he, said Wilt, with *with* the goods and partnership funds purchased a considerable real estate for and on account of said firm, as the books of said firm will show, the title deeds to which the said "Christian Wilt" always took in the name of said firm "Christian Wilt." That in this way he purchased, amongst considerable other real estate, situate in Missouri and Illinois, the following property, situate, lying, and being in the said county of Saint Louis, to wit, one certain lot, piece, or parcel of ground in the town of St. Louis, containing one hundred and twenty feet, French measure, in front, by one hundred and fifty feet, more or less, in debth; bounded on the west and in front by First Main street, north by a cross street, which separates it from Andrie L. Andreville, east by the river Mississippi, and south by the lot now occupied by Gabriel Paul; it being the same lot purchased by said Wilt in part from Edward Hemstead and wife,
43 by deed dated August 1st, 1811, and recorded in the office of the recorder St. Louis County, in book C, pages 457 and following; and the other part from Pierre Chouteau, sen'r, and wife, by deed dated September 2d, 1812, and recorded in the same office, book C, pages 66 and following, all of which may more fully appear by reference to said deeds and records; upon which said lot the said Christian Wilt erected, for the use and benefit of said concern, and out of its funds, a large brick store, dwelling-house, stable, out-houses, and also a factory for the manufactory of white and red lead, and other adjoining and necessary buildings attached to said factory.

Also one other lot, part, and piece of ground situate in the same town, containing the quantity of sixty feet front, running back one hundred and fifteen feet; bounded in front by First Main street, north by the lot of Michael Rollette, south by lot of Francis M. Benoist, deceased, and west by a lot of Joseph and Francos Robidoux, on which said lot there is a brick house and candle and soap factory, and which was purchased at sheriff's sale as Joseph Henderson's property, as may

fully appear by reference to the sheriff's deed for the same, recorded in the office aforesaid in book H, page 471 and following.

Also one other lot or parcel of ground, situate in the same town, containing thirty feet front by one hundred and fifty feet deep; bounded in front and eastwardly by First Main street, south by a lot formerly owned by Lewis Latourneau, north by a lot now occupied by Thomas Forsyth, and west by lot of William C. Carr, being the same lot acquired by said Wilt from Louis Latourneau and wife by deed dated June 16th, 1816; deed recorded in same office, book E, page 515 and following.

Also the undivided moiety or half part of a certain tract or parcel of land situate, lying, and being in the same county, containing two hundred and four acres; bounded on the north by lands formerly owned by Capt. W'm Massay, south by land of Anthony Soulard, as will more fully and at large appear by reference to the deed of conveyance for the same from Simon Bruster and wife, dated May 12th, 1818, and recorded in the aforesaid office, book G, pages 302 and following; the other part of said belongs to Col. James Morrison, of Lexington.

Also a certain other tract or parcel of land, situate, lying, and being about three and a half miles southwest of the town of Saint Louis, in the prairie called the "Barriere des Noyer," containing the quantity of six hundred and forty acres, be the same more or less, it being a certain location made by the said Christian Wilt by virtue of a certain New Madrid certificate, so called, the number whereof is "150," dated Nov. 30, 1815, in the name of James Y. O'Carroll or his legal representatives, all which will more fully appear by reference to said location, in the office of the surveyor United States lands for Missouri, Illinois, and Arkansas, and to the deed of transfer for said certificate from James Tanner, as the legal representative of said James Y. O'Carroll, to said Christian Wilt, dated in the year 1806, and recorded in the same office for St. Louis County, book H, pages 237, '8, and '9.

And your orator further showeth that the said partnership continued as aforesaid until the fall of 1818, when your orator agreed to
44 advance for the said Andrew Wilt, since deceased, his share of capital stock, to wit, one-third, and the said Christian Wilt and your orator agreed that said Andrew should be taken in as a equal third partner in the said firm of St. Louis, and that the whole effects, credits, and goods, and stock in trade in the now State of Missouri of the said firm of Christian Wilt should form the stock of the new firm, to be styled "C. & A. Wilt & Co.," which last firm continued till the unfortunate death of said A. Wilt and said Christian Wilt, in the summer of 1819; during the existence of which said last-mentioned partnership they made no profits, and on the contrary lost much.

And your orator further sheweth that said Christian Wilt died without there having been any settlement of the accounts of the original firm, which had contracted some debts, most of which *which* remain still unsettled.

And your orator further sheweth that said firm of Christian Wilt has been re-established in that name since the death of said Andrew Wilt, inasmuch as said firm of "C. & A. Wilt & Co." had made no profits, and as all the capital stock of the share of said Andrew was advanced by your orator.

And your orator further sheweth that said Christian Wilt died intestate, leaving, as his next of kin and only heir and legal representative, his infant son, George Wilson Wilt, aged about four years,

the wife of said Christian having died about four years previously. And your orator further states that Charles S. Hemstead, the brother-in-law of said Christian, then and at present of the said town and County of St. Louis, and whom he prays may be made defendant to this bill, administered on the estate of said Christain Welt, deceased, and was also by the circuit court of Saint Louis County aforesaid duly appointed guardian to said George W. Wilt, who is now residing with his guardian.

But now so it is, may it please your honorable court, that it has become necessary to secure some debts, and pay others of said firm of Christian Wilt, by mortgaging and selling some of the real estate above described, which cannot he done legally so long as the titles to said real estate is in the heir of said Christian, from whom they cannot be divested, save by the intervention of this honorable court.

In tender consideration whereof, and forasmuch as your orator is remediless in the premises at and by the direct and strict rules of the common law, and cannot have adequate relief only in a court of equity, where matters of this and a like nature are properly cognizable:

Therefore your orator prays that said Charles S. Hempstead, as administrator and guardian aforesaid, may answer hereto; and that you will, on such answer, order and decree that he, said Hemstead, as guardian as aforesaid, do convey and transfer by deed all the real estate mentioned in this bill to your said orator, as surviving partner of the late firm of "Christian Wilt," for the purposes aforesaid.

And he, &c.

JOSEPH HERTZOG,
*Surv'g Part'r of C. Wilt & Co.*

45 COUNTY OF ST. LOUIS, *set:*

Joseph Hertzog, the above-named complainant, being duly sworn, says that the facts stated in the foregoing bill of complaint are true.

JOSEPH HERTZOG,
*Surv'g Part'r of C. Wilt & Co.*

Sworn to and subscribed before me, a justice of the peace in and for said county, this 3d day of September, 1821.

THOS. McGUIRE, *J. P.* [SEAL.]

The above-named Charles S. Hemstead, guardian as aforesaid, for answer to so much of the foregoing bill of complaint as is material, says that he admits the facts stated in the foregoing bill are true to the best of his information and belief, and can urge no reason why the prayer of said complainant should not be granted if this honorable should think proper so to do, &c.

CHAS. S. HEMSTEAD,
*Guardian as aforesaid.*

Sworn to and subscribed in open court this 4th day of September, 1821.

A. GAMBLE, *Clerk.*

In the circuit court of St. Louis county, at August term, 1821, sitting as a court of chancery.

JOSEPH HERTZOG, SURVIVING PARTNER OF the late firm of "Christain Wilt,"
*vs.*
CHARLES S. HEMSTEAD, GUARDIAN OF George W. Wilt, infant heir of Christian Wilt, deceased.

This cause coming on this present day to be heard, by consent of all parties, before the honorable the circuit court in and for the said county of Saint Louis, sitting as a court of chancery, upon bill and answer, in presence of the parties concerned, the substance of the plaintiff's bill appears to be that, in the month of June, in the year one thousand eight hundred and eleven, the said plaintiff, then residing in the city of Philadelphia, agreed with Christian Wilt, his nephew, and who he had raised in his store, then residing in St. Louis, but since deceased, to form a partnership in the trade and business of selling merchandise in the then Louisiana Territory, and also in whatever other business they might choose to pursue in said Territory, the terms of which partnership were these: The said plaintiff was to furnish all the capital, purchase the goods at Philadelphia and elsewhere at the eastward, attend to the transportation of the same, and in general to perform all things which might be necessary and proper as a partner residing at the eastward; the said Christian Wilt, on his part, was to reside
46 at and superantend all the business of the concern at St. Louis and elsewhare in said Territory, for which he was to have and receive one-third of the profits, and suffer one-third of the losses. That in pursuance of this understanding and agreement, it was further consented by said plaintiff that the name and style of the firm might be as the said Christain Wilt might deem fit, who thereupon adopted the style of "Christian Wilt," under which name and firm they commenced business at St. Louis and elsewhere in the now State of Missouri, and continued with much success until fall of 1818, when the said partners agreed to take unto their said firm, at St. Louis, Andrew Wilt, the brother of said Christian Wilt. And the said plaintiff further stated that, during the partnership of "Christian Wilt" aforesaid, he, said Wilt, with the goods and partnership funds purchased a considerable real estate for and on account of said firm, as the books of said firm will show, the title deeds to which the said Christian Wilt always took in the name of said firm, "Christian Wilt."

That in this way he purchased, amongst considerable other real estate situate in Missouri and Illinois, the following property, situate, being, and ling in the said county of Saint Louis, to wit: One certain lot, piece, or parcel of ground, in the town of Saint Louis, containing one hundred and twenty feet, French measure, in front, by one hundred and fifty feet, more or less, in depth; bounded on the west and in front by First Main street, north by a cross street, which separates it from a lot of Andre L. Andreville, east by the river Mississippi, and south by the lot now occupied by Gabriel Paul, it being the same lot purchased by said Wilt in part from Edward Hemstead and wife by deed dated Aug. 1st, 1811, and recorded in the office of the recorder, St. Louis County, in book C, page 457 and following; and the other part from Pierre Chouteau, sen'r, and wife, by deed dated September 2d, 1812, and recorded in the same office, book C, page 66 and

following, all which may more fully *and fully* appear by reference to said deeds and records; upon which said lot the said Christian Wilt erected, for the use and benefit of said concern and out of its funds, a large brick store, dwelling-house, stable, out-houses, and also a factory for the manufacture of white and red lead, and other adjoining and necessary buildings attached to said factory.

Also one other lot, part, and piece of ground, situate in the same town, containing the quantity of sixty feet front, running back one hundred and fifteen feet; bounded in front by First Main street, north by the lot of Michel Rolletto, south by lot of Francois M. Benoist, deceased, and west by a lot of Joseph and Francois Robidoux, on which said lot there is a brick house and candle and soap factory, and which was purchased at sheriff's sale as Joseph Henderson's property, as may fully appear by reference to the sheriff's deed for the same, recorded in the office aforesaid in book H, page 471 and following.

Also one other lot or parcel of ground, situate in the same town, containing thirty feet front by one hundred and fifty feet deep; bounded in front and eastwardly by First Main street, south by a lot formerly owned by Louis Latourneau, north by lot now occupied by
47 Thomas Forsythe, and west by lot of William C. Carr, being the same lot acquired by said Wilt from Louis Latourneau and wife by deed dated June 16th, 1816, and recorded in the same office, book E, page 515 and following.

Also the undivided moiety or half part of a certain tract or parcel of land, situate, lying, and being in the same county, containing two hundred and four acres; bounded on the north by lands formerly owned by Capt. W'm Massey, deceased, south by lands of Anthony Soulard, as will more fully and at large appear by reference to the deed of conveyance for the same from Simon Bruster and wife, dated May 12, 1818, and recorded in the aforesaid office, book G, page 302 and following; the other part of said belongs to Col. James Morrison, of Lexington.

Also a certain other tract or parcel of land, situate, lying, and being about three and a half miles southwest of the town of Saint Louis, in the prairie called the "Barriere des Noyer," containing the quantity of six hundred and forty acres, be the same more or less, it being a certain location made by the said Christian Wilt by virtue of a certain New Madrid certificate, so-called, the number whereof is "150," dated November 30, 1815, in the name of James Y. O'Carroll, or his legal representatives, all which will more fully appear by reference to said location in the office of the surveyor United States lands for Missouri, Illinois, and Arkansas, and to the deed of transfer for said certificate, from James Tanner, as the legal representative of said James Y. O'Carroll, to said Christian Wilt, dated in the year 1816, and recorded in the same office in St. Louis County, book H, page 237, '8, and '9. And the said plaintiff in his said bill also stated that the partnership continued as aforesaid until the fall of 1818, when your orator agreed to advance for the said Andrew Wilt, since deceased, his share of capital stock, to wit, one-third, and the said Christian Wilt agreed that said Andrew should be taken in as an equal third partner in the said firm at St. Louis, and that the whole effects, credits, and goods, and stocks in trade in the now State of Missouri of the said firm of Christian Wilt should form the stock of the new firm, to be styled "C. & A. Wilt & Co.," which last firm continued until the unfortunate death of said Andrew Wilt and said Christian Wilt, in the summer of 1819, during the existence of which said last-mentioned partnership they made no profits, and on the con-

trary lost much; that said Christian Wilt died without there having been any settlement of the accounts of the original firm, which had contracted some debts, most of which remain still unsettled; that said firm of Christian Wilt has been re-established in that name since the death of said Andrew Wilt, inasmuch as said firm of "C. & A. Wilt & Co." had made no profits, and as all the capital stock of the share of said Andrew was advanced; that said Christian Wilt died intestate, leaving as his next of kin and only heir and legal representative, his infant son, George Wilson Wilt, aged about four years, the wife of said Christian having died about four years previously. And your orator further states that Charles S. Hemstead, (the brother-in-law of said Christian,) then and at present of the said town and county of
48 St. Louis, and whom he prays may be made defendant to this bill, administered on the estate of said Christian Wilt, deceased, and was also by the circuit court of St. Louis County aforesaid duly appointed guardian to said George W. Wilt, who is now residing with his said guardian. Wherefore said plaintiff prayed the said honorable court that, as it had become necessary to secure some debts, and pay others of said firm of Christian Wilt, by mortgaging and selling some of the real estate above described, which can only be done legally, so long as the titles to said real estate is in the heir of said Christian, from whom they cannot be divested, save by the intervention of this honorable court, that said Charles S. Hemstead, as administrator and guardian aforesaid, may answer hereto, and that said court would on such answer order and decree that he, said Hemstead, as guardian as aforesaid, do convey and transfer by deed all the estate nentioned in this bill to your said orator, as surviving partner of the late firm of Christian Wilt, for the purpose aforesaid.

Whereunto the said Charles S. Hemstead, guardian as aforesaid, by his answer admits that the facts stated in the above-mentioned bill were true and justly stated, according to the best of his information and belief; and that he could urge nothing against said order and decree if the said court should deem meet and proper to make and order it. Whereupon the court doth think fit, and so order and decree, and it is accordingly ordered and adjugded, that said Charles S. Hemstead, as guardian of the said George Wilson Wilt, infant and sole heir of said Christian Wilt, deceased, the above-described several pieces and parcels of real estate described in said bill, do convey and transfer the same to said Joseph Hertzog, as surviving partner of the said firm of Christian Wilt, and for the use of said firm; and that Hemstead as guardian as aforesaid, do execute and deliver the proper and necessary deed or deeds for the same; and that said plaintiff pay all costs and charges of this suit, &c.

15. Deed of Joseph Hertzog to Louis Devotion's trustee, dated 26th October, 1822, as follows:

*Deed of Jos. Hertzog to L. Devotion's trustee.*

This deed of trust, made and entered into this twenty-sixth day of October, eighteen hundred and twenty-two, by and between Joseph Hertzog, of the town and county of St. Louis, of the first part, and Robert Wash, as trustee for Louis Devotions, of the same place, witnesseth: That whereas the said party of the first part is indebted to the Louis Devotion in the sum of nine thousand five hundred and forty-nine dollars, lawful money of the United States, it being the balance due on a judg-

ment obtained by the said Devotion against the said Hertzog, in the St. Louis circuit court, on which execution has issued, and is in the hands of the sheriff:

Now, therefore, in consideration of the debt aforesaid due from the said Hertzog to the said Devotion, and in consideration of the credit and indulgence hereby given to the said party of the first part in the payment of said debt, and the better to secure the payment of
49 the same, as also for *for* and in consideration of the mutual trust and confidence reposed in the said R. Wash, who is charged and entrusted with the collection of said debt, in the way of his profession as the attorney-at-law of the said Devotion, he, the said party *party* of the first part, hath granted, bargained, and sold, and doth hereby grant, bargain, and sell, unto him, the said R. Wash, his heirs and assigns forever, the following described town lots and tracts or parcels of land, situate, lying, and being on the State of Missouri:

First. All that lot or parcel of ground situate, lying, and being on the east side of Main street, fronting one hundred and twenty feet, more or less, on said Main street, and running back to the bluff or bank of the river, it being the same whereon the said party of the first part now resides, and which was formerly owned by Christian Wilt, who purchased the same of Edward Hemstead and August Chouteau, as per reference to the deeds of record will more fully appear.

Second. One other lot or parcel of ground situate, lying, and being in the town of St. Louis aforesaid, on the west side of Main street, near the lower end of the same, containing about sixty feet front, more or less, on Main street, and running back one hundred and fifty feet, it being the same formerly owned by one Joseph Henderson, who erected thereon a two-story brick house, and on which the said party of the first part has now — operation a soap and candle factory.

Third. A certain tract or parcel of land situate, lying, and being in the county of St. Louis aforesaid, containing six hundred and forty acres, located by Christian Wilt for James Y. O'Carroll, or his legal representatives, by virtue of a certificate, commonly called a new Madrid certificate, (No. 150,) number one hundred and fifty, dated (Nov. 30th, 1815) November the thirtieth, eighteen hundred and fifteen, as per reference to the location and plat of survey thereof in the surveyor general's office will more fully appear.

Fourth. One other tract or parcel of land situate, lying, and being in the county of Jefferson, State of Missouri aforesaid, containing six hundred and forty acres, or thereabouts, it being the same purchased by the above-named Christian Wilt of one Judathan Kendal, commonly know as the New Hartford tract, whereon the said Wilt erected a tower for the manufactory of shot, as per reference to the title papers of record will more fully and at large appear. To have and to hold the above sold and described premises, together with all and singular the buildings and improvements thereon, unto him, the said R. Wash, his heirs and assigns forever, yet in trust and upon the express confidimes, that if the said party of the first part shall pay or cause to be paid to the said party of the second part, or to the said Devotion, the aforesaid debt at the time and in the manner following, viz, one thousand dollars, together with ten per centum interest thereon, to be computed from this date, on or before the first day of March next; one-third of
50 the balance, together with ten per centum interest thereon, to be computed from any date on or before the first day of November, eighteen hundred and twenty-three; one other third of said balance, together with ten per centum interest thereon, to be com-

puted as aforesaid, on or before the first day of November, eighteen hundred and twenty; and the remainiing third, interest thereon as aforesaid, to be computed as aforesaid, on or before the first day of November, eighteen hundred and twenty-five, then this deed shall be and become null and void. And if the said party of the first part shall fail, neglect, or refuse to pay the debt aforesaid, in the manner and at the terms aforesaid, together with the ten per centum interest thereon as aforesaid, it is the object and intention of this deed, and the express understanding of the parties hereto, that the said R. Wash, his heirs or assigns, shall have full power and authority to sell, and shall sell, at public sale, upon giving ten days' public notice, any, all, or so much of said property above described as he may *deed* sufficient to pay and satisfy the several payments so to become due, as above provided for, together with the interest thereon, and the reasonable and necessary costs of proceeding to execute the trust hereby delegated, and the money arising from such sale or sales shall be received and taken in satisfaction and discharge of so much of said debt; and if by the sale of any of the abovementioned lots or tracts of land more money shall be raised than will suffice to discharge the payment becoming due as aforesaid, the same shall be applied to the subsequent payment. It is the intention, however, of the parties of these presents that, whenever it becomes necessary to sell any portion of the property above described, the terms of sale shall be, "for so much specie in hand as will be sufficient to discharge the payment then due, and a credit for the balance to suit the payment herein provided for."

It being understood that said trustee shall not at any one time offer and sell more of the real estate hereinbefor(e) described *that* will be sufficient, in his opinion, to raise the installments due at the time being.

And further and lastly, it is understood and agreed between said parties hereto that such parts and parcels of said real estate as shall remain unsold, after satisfying the aforesaid trust, shall stand seized in said trustee and his heirs and assigns to and for the sole use, benefit, and behoof — said Hertzog and his heirs and assigns forever.

Witness our hands and seals the day and year first herein written.

JOSEPH HERTZOG. [SEAL.]
R. WASH. [SEAL.]

Signed, sealed, and delivered in presence of—
R. WASH.
JNO. K. WALKER.

51 STATE OF MISSOURI, *County of St. Louis, ss:*

This day personally appeared before me, the clerk of the circuit court for St. Louis County, Robert Wash, one of the subscribing witnesses to the foregoing trust deed, and known to me to be such witness, and, being duly sworn, upon his oath says that he saw the said Joseph Hertzog sign and seal the foregoing deed; and that he, the said Hertzog, then and there acknowledged the same for his act and deed, hand and seal, for the purposes therein mentioned. And said deponent further says that he knows the said Joseph Hertzog, and that he is the same person who executed said deed.

Given under my hand and seal of office at St. Louis, November 18th, 1822.

[L. S.] ARCHIBALD GAMBLE, *Clerk.*

Recorded Nov. 18th, 1822.

ARCHIBALD GAMBLE, *Clerk.*

STATE OF MISSOURI, *County of St. Louis. ss:*

I, the undersigned, recorder in and for the county aforesaid, do hereby certify that the foregoing is a true and correct copy of a deed from Joseph Hertzog to R. Wash, as also of the acknowledgement thereof, and of the date of recording of same, as the same remains of record in my office in book , page 191.

Witness my hand and official seal this 3d day of May, 1863.

[L. S.] A. C. BERNOUDY, *Recorder*,
Per J. CONRAD, *Deputy*.

16. Deed of Louis Devotion and Joseph Hertzog, by trustee, to Pierre Chouteau, jr., dated 27 November, 1824, as follows:

*Deed of Hertzog, by trustee, to P. Chouteau, jr.*

This deed, made and concluded between Robert Wash, trustee of Joseph Hertzog, late of the city and county of St. Louis, of the one part, and Peter Chouteau, junior, of the same place, of the other part, witnesseth: That said Robert Wash, as trustee as aforesaid, and by virtue of the power and authority in him vested by said Joseph Hertzog, by a certain deed executed, bearing date the twenty-sixth day of October, in the year 1822, and duly recorded in the office of the recorder of St. Louis County, reference being had thereto will more fully and at large appear, as also for and in consideration of the sum of one hundred and twenty-eight dollars, current money of the United States, to him, said Robert Wash, well and truly paid, the receipt whereof is hereby acknowledged, hath sold, released, assigned, and confirmed, and by these presents doth sell, assign, release, and confirm, unto said Peter Chouteau, junior, and his heirs and assigns forever, all right, title, interest, property, and estate which the said Joseph Hertzog had at the date of the deed of trust aforesaid in and to the following-described tract of land, situate, lying,
52 and being in the county of St. Louis aforesaid, that is to say, sixty-four acres, English measure, part and parcel of a tract of six hundred and forty acres, located by the late Christian Wilt, deceased, as assignee of the certificate in the name of James Y. O'Carroll, which said location is in township No. 45, range 7 east, the particulars of the said entry of location as the boundaries thereof may be seen by reference to the books of the surveyor of public lands of Missouri, Illilinois, and Arkansas, and which tract and location has been duly conveyed by the legal representatives of said Christian Wilt to said Joseph Hertzog, as may appear by reference to record of the same in the office of St. Louis County, and by said Joseph Hertzog conveyed to said Robert Wash, in said deed of trust above-mentioned; said sixty-four acres are to be taken and laid off of the western side of said location and tract of six hundred and forty acres, adjoining the *Crouge* [League] square, confirmed to the late Charles Gratiot, deceased, the line to commence where the southwestern line of Susannah Dutrail's confirmation of eighty arpens, No. 833, intersects the eastern line of said League square; and then to run southwardly with the last-mentioned line to the line of the Bureror des Noyer's Fields, and then eastwardly and nothwardly for quantity to be surveyed as near in a square as may be from said described boundaries, as may appear by reference to the plat of township No. 45 aforesaid, in said surveyor's office: To have and to hold said granted and described premises, with all and singular the appurtenances thereunto in any wise belonging, unto him, the said Peter Chouteau, junior, and his heirs and assigns forever.

In witness whereof I, the said Robert Wash, have hereunto set my hand and affixed my seal, at St. Louis, this twenty-seventh day of November, A. D. 1824.

R. WASH. [SEAL.]

Signed, sealed, and delivered in presence of—
CH. S. HEMSTEAD.
JAMES R. PECK.

STATE OF MISSOURI, *County of St. Louis, to wit:*

Personally appeared before me this day, the undersigned, a justice of peace in and for the county aforesaid, the above-named Robert Wash, (personally well known to me,) who acknowledged that he sealed and executed the above deed, freely and voluntarily, for the purpose therein expressed.

Certified and taken by me this 30th day of November, 1824.

P. WASH, *J. P.*

Recorded December 13th, 1824.

ARCHIBALD GAMBLE, *Clerk.*

STATE OF MISSOURI, *County of St. Louis, ss:*

I, the undersigned, recorder for said county, certify that the foregoing is a true copy of a deed from Joseph Hertzog's trustee to P. Chouteau, junior, the certificate of acknowledgment, and the date of
53 recording, as fully as the same remains of record in my office in book M, p. 172.

Witness my hand and official seal this 2d day of May, 1863.

[L. S.] A. C. BERNOUDY, *Recorder,*
Per J. CONRAD, *Deputy.*

[U. S. stamp.]

17. Deed of Joseph Hertzog, by sheriff, to Henry Clay, executor of James Morrison, dated the 17th May, 1825, as follows:

*Deed of Jos. Hertzog, by sheriff, to H. Clay, executor of Ja's Morrison*

To all to whom these presents shall come, I, John K. Walker, sheriff of the county of St. Louis, in the State of Missouri, send greeting:

Whereas a writ of execution, issued from the clerk's office of the circuit court within and for the county of St. Louis, returnable to the February term of said court, in the year one thousand eight hundred and twenty-five, in favor of Henry Clay, executor of James Morrison, deceased, against Joseph Hertzog, which said execution became returnable to the March term of said court, in the year aforesaid, pursuant to an act of the last general assembly, entitled "An act to establish judicial district and circuits, and prescribing the times and places of holding courts," approved February 5th, 1825, and which execution is in the words and figures following, to wit:

"STATE OF MISSOURI, *County of St. Louis, ss:*

"To the sheriff of St. Louis county, greeting:

"Whereas Henry Clay, executor of James Morrison, deceased, at our circuit court, before our judge thereof, hath recovered against Joseph Hertzog the sum of two thousand two hundred and eighty-six dollars for his debt, and also the further sum of one hundred and forty-seven

dollars and forty-five cents for his damages by him sustained by reason of the detention of said debt, and also his costs and charges by him about his suit in that behalf expended, which to the said H. Clay, executor of James Morrison, deceased, were adjudged, as appears to us of record: These are therefore to command you that of the goods and chattels, lands and tenements of the said Joseph Hertzog, in your bailiwick, you cause to be made the aforesaid debt, damages, and costs, and that you have the same before the judge of our said ——, on the first Monday of February next, to render to the said Henry Clay, executor as aforesaid, the debt, damages, and costs aforesaid. And for want of sufficient goods and chattels, lands and tenements, whereon to levy and make the same, we command you to take the said Joseph Hertzog, if he be found in your bailiwick, and him safely keep, so that you may have his body before the said judge on the said first Monday of February, to satisfy the said Henry Clay, executor as aforesaid, of the aforesaid debt, damages, and costs, and that you certify to our said judge how you execute this writ; and have you then there this writ.

54 "Witness Archibald Gamble, clerk of our said court, at St. Louis, this thirteenth day of December, in the year of our Lord one thousand eight hundred and twenty-four.

[L. S.] "ARCHIBALD GAMBLE, *Clerk.*"

Which said execution being directed to the sheriff of the county of St. Louis aforesaid, and to me, said sheriff, delivered, by virtue of which said execution I did, on the first day of January, in the year one thousand eight hundred and twenty-five, levy upon and seize all the right, title, interest, estate, and property of the said Joseph Hertzog in and to the following described real estate:

First. A lot of ground in the city of St. Louis, containing thirty feet front by one hundred and fifty feet deep; bounded east by Main street, south by lot of Louis Letournois, north and west by a lot of William C. Carr.

Second. A lot of ground, with the buildings, &c., thereon, in the city of St. Louis aforesaid, containing sixty feet front by one hundred and fifteen feet deep, more or less; bounded on the east by Main street, which separates it from a lot of William C. Carr, on the south by a lot of Benoist, west by a lot of Robidoux, and north by a lot of Michel Ladrevotte, on which said lot is the soap factory erected by Joseph Henderson

Third. The undivided half of a tract of land, containing two hundred and four acres, situated in the township of St. Ferdinand, originally granted to Lawrence Huff; bounded on the north by lands formerly owned by William Massie, on the south by land of A. Soulard, acquired by Christian Wilt of Simon Brewster by deed dated May 12th, 1818.

Fourthly. A tract or parcel of land, lying about three and half miles southwest of the city of St. Louis, in prairie called Barrie de Noyer, containing six hundred and forty acres, more or less, located by virtue of a New Madrid certificate, No. 150, dated 30th November, 1815, granted to James Y. O'Carroll, or his legal representatives.

And the said property being advertised as the law directs, by fixing advertisements in six of the most public places in my county, at least twenty days before the day of sale; which said advertisements were in the words and figures following, to wit:

"*Sheriff's sale.*

"By virtue of a writ of execution, to me directed from the circuit court in favor of Henry Clay, executor of James Morrison, against Joseph Hertzog, I have levied upon and will sell for cash to the highest bidder, at the court-house door, in St. Louis, on Thursday, the 10th day of February next, between the hours of 9 and 4, all the right, title, claim, interest, estate, and property of said defendant in and to the following-described real estate, to wit:

"1st. A lot of ground in St. Louis, containing thirty feet front by 150 feet deep; bounded east by Main street, south by a lot of Louis Letournois, north and south by a lot of Wm. C. Carr.

2d. A lot of ground, with the buildings, &c., thereon, containing 60 feet front by 115 feet deep, more or less; bounded east by Main street, south by a lot of "Benoist," west by a lot of Robidoux, and north by a lot of Michel Laderotte.

"3d. The undivided half or tract of land containing 204 acres, situated in the township of St. Ferdinand, being the same tract of land originally granted to Lawrence Huff.

"4th. A tract of land containing 640 acres, situated in the Barrie Danoyer Prairie, located by virtue of a New Madrid certificate, No. 150, and bearing date Nov. 30, 1815.

"JOHN K. WALKER, *Sheriff.*

"ST. LOUIS, *January 1st*, 1825."

And whereas the act of assembly above referred to provides that all property advertised for sale at the February term of said court shall be sold on the same day of the March term that it would have been sold on at the February term if no such act had been passed; by virtue of which said execution and advertisements, and act of assembly above referred to, I did, on the 31st day of March, in the year eighteen hundred and twenty-five, it being the same day of the March term of said court that the above-described property was advertised for sale at the said February term, expose to sale, agreeably to the advertisement thereof and the act of assembly above referred to, at the court-house door, in the city of St. Louis, during the sitting of the circuit court of said county, for ready cash, all the right, title, interest, estate, and property of him, the said Joseph Hertzog, of, in, and to the above-described property, together with all and singular the building and improvements thereon; and Henry Clay, executor of James Morrison, deceased, being the highest and last bidder for the second above-described town lot, at the price and sum of five hundred dollars, and for the tract of land thirdly above described, at the price and sum of two hundred and fifty dollars, and for the tract of land fourthly and lastly described, at the price and sum of four hundred and fifty dollars, making in all the sum of one thousand and two hundred dollars, the same was struck off and sold to him, the said Henry Clay, executor of Jas. Morrison, as aforesaid:

Now, therefore, know ye that I, John K. Walker, sheriff as aforesaid, for and in consideration of the sum of one thousand two hundred dollars, to me in hand paid by the said Henry Clay, executor as aforesaid, the receipt whereof I do hereby acknowledge, and by virtue of the authority in me vested by law, I do hereby transfer and assign to him, the said Henry Clay, executor as aforesaid, all the right, title, interest, estate, and property of him, the said Jos. Hertzog, of, in, and to the above secondly-described town lot and tracts of land, that I might sell, agreeably to law as sheriff aforesaid, by virtue of the aforesaid execution and

advertisement and act of assembly above referred to: To have and to hold to him, the said Henry Clay, executor as aforesaid, and to his heirs and assigns forever.

In witness whereof I, John K. Walker, sheriff of the county of St. Louis, have hereunto set my hand and seal this seventeenth day
56 of May, in the year of our Lord one thousand eight hundred and twenty-five, and of the independence of the United States the forty-ninth.

JOHN K. WALKER, *Sheriff.*

STATE OF MISSOURI, *County of St. Louis, ss:*

Be it remembered that, on the seventeenth day of May, in the year one thousand eight hundred and twenty-five, John K. Walker, sheriff of the county of St. Louis, personally appeared in open court and acknowledged the execution of the within deed from him, as sheriff, to Henry Clay, executor of James Morrison, deceased, therein named, which said acknowledgment is entered on the records of the court of that day.

Given under my hand and seal of office at St. Louis this seventeenth day of May, in the year one thousand eight hundred and twenty-five.

[L. S.] ARCHIBALD GAMBLE, *Clerk.*

[NOTE.—The words "of land" in the fifth line from the bottom of the preceding page are interlined in the original.]

Recorded 7th June, 1825.

ARCHIBALD GAMBLE, *Recorder.*

STATE OF MISSOURI, *County of St. Louis, ss:*

I, the undersigned, recorder for said county, certify that the foregoing is a true copy of a deed from Jos. Hertzog, by sheriff, to Henry Clay, executor of James Morrison, deceased, the certificate of acknowledgment, and the date of recording, as fully as the same remains of record in my office in book M, page 303.

Witness my hand and official seal this 4th day of May, 1863.

[L. S.] A. C. BERNOUDY, *Recorder,*
Per J. CONRAD, *Deputy.*

[U. S. stamp.]

18. Judgment of St. Louis circuit court in case of Henry Clay, executor of Morrison vs. Joseph Hertzog, as follows:

*Judgement of circuit court in case of Clay vs. Jos. Hertzog.*

In the Saint Louis circuit court, in chancery, November term, 1831, May 10th, 1833.

HENRY CLAY
*vs.*
CHRISTIAN WILT AND JOSEPH HERTZOG'S heirs, and Robert Wash.

And now, on this 10th day of May, in the year of our Lord 1832, comes the complainant and prays for a decree pro confesso; and it appearing to the court that publication as to the non-resident defendants has been duly made, and that the summons was duly served on
57 Robert Wash, one of the defendants, and that no answer has been filed by any of the defendants, the court doth therefore order said

bill of complaint and its several allegations to be taken as confessed against said defendants, and each of them, and doth thereupon order, adjudge, and decree that all the right, title, interest, and estate in law or equity of the defendants, Edward Hemstead, Charles S. Hemstead, jr., Catherine Hertzog, Michael Baker, and Elizabeth, his wife, George Ritter, and Ann, his wife, Abraham Wilt, John Dougherty, and Mary, his wife, William Collins, and Elizabeth, his wife, Rachel Hertzog, Ann Hertzog, and Robert Wash, and each of them, of, in, and to the lands and tenements in Saint Louis County, and described in the said bill as follows, to wit:

The undivided half of a tract of land, containing two hundred and four acres, bounded on the north by lands formerly owned by Capt. William Massey, south by lands of Anthony Soulard, acquired by Christian Wilt from Simon Bruster and wife by deed dated May 12th, 1818.

Also anothe tract of land lying about three and a half miles southwest of the town of St. Louis, in the prairie called the "Barriere des Noyer," containing the quanty of six hundred and forty acres, more or less, it being a location by virtue of a New Madrid certificate, numbered 150, dated November 30th, 1815, in the name of James Y. O'Carroll—

Pass to and vested in, and the same are passed to and are hereby vested in, said Henry Clay, executor of William Morrison, in fee-simple forever, free and clear from *and* claim of said defendants, or either of them.

And it is further ordered, adjudged, and decreed that Wash shall, on demand, make, execute, and deliver to the complainant release of all his right, title, and interest in law or equity, as trustee or otherwise, in said lands and tenements, or either of them.

This decree is, however, entered conditionally, that if said defendant Wash shall appear at the next term of this court and file his answer to the bill, on showing good cause why he has not appeared and filed his answer thereto heretofore, and on paying the costs of this decree, then this decree as to him shall be set aside; and, as to the other defendants, this decree is also entered conditionally, to wit, that if said last-named defendants shall not appear within five years from the date of this decree, and bring their bill of review, said decree shall, after the end of said five years, stand absolute.

STATE OF MISSOURI, *County of St. Louis, ss:*

I, Stephen Rice, clerk of the circuit court, certify the foregoing to be a true copy of a decree in chancery, in the above-entitled cause, as fully as the same remains of record in my office.

In testimony whereof I hereunto set my hand and affix seal of said office, in the city of St. Louis, this 24th day of Nov., A. D. 1863.

[L. S.] STEPHEN RICE, *Clerk.*

[U. S. stamp.]

58 19. Deed of Henry Clay, executor of Morrison, to Ann F. McRee, dated Oct. 11th, 1839, as follows:

*Deed of H. Clay and wife to Ann McRee.*

This deed, made this 11th day of October, in the year of our Lord 1839, witnesseth: That Henry Clay, and Lucretia, his wife, of Lexington, in the State of Kentucky, for and in consideration of the sum of

five hundred dollars, heretofore paid to the said Henry Clay by W'm McRee, of the city of St. Louis, in the State of Missouri, now deceased, the receipt of which sum is hereby acknowledged, have bargained, sold, and conveyed, and by these presents do bargain, sell, and convey, to Ann McRee, James F. McRee, and Samuel McRee, heirs and representatives of the said William McRee, deceased, all that certain tract or parcel of land situate in the county of St. Louis, and State of Missouri, lying about three and a half miles southwest of the city of St. Louis, containing six hundred and forty acres, more or less, located by virtue of a New Madrid certificate, number 150, issued to James Y. O'Carroll, or his legal representatives, being the same tract of land acquired by the said Henry Clay at sheriff's sale as the property of Joseph Hertzog, as will appear by reference to the sheriff's deed to the said Henry Clay, dated the seventeenth day of May, in the year eighteen hundred and twenty-five, and recorded in the recorder's office of St. Louis County on the seventh day of June, in the year eighteen hundred and twenty-five: To have and to hold the said tract of land above described unto the said Ann McRee, James F. McRee, and Samuel McRee, as heirs at law of said William McRee, deceased, in the share and proportions in which they are entitled by law to the estate of the said deceased, in the State of Missouri, and to their heirs forever. And the said Henry Clay warrants the title to the said tract of land against all persons claiming the same under him, but against no other claim or person whatever.

In witness whereof the said Henry Clay and wife have hereto set their hands and seals the date above written.

HENRY CLAY. [SEAL.]
LUCRETIA CLAY. [SEAL.]

"And to their heirs forever," interlined before signing.

COMMONWEALTH OF KENTUCHY, *County of Fayette:*

Be it remembered that on this day personally appeared before the undersigned, clerk of the county court of Fayette County, Henry Clay, and Lucretia, his wife, who are both personally known to me to be the persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and severally acknowledged the same to be their act and deed for the purposes therein mentioned; and she, the said Lucretia Clay, being by me made acquainted with the contents of the said instrument of writing, acknowledged, on examination apart from her said husband, that she executed the same, and relinquished her dower in the real estate therein mentioned freely and without compulsion or undue influence of her husband.

59 In testimony whereof I have hereto set my hand and seal of said county court, at Lexington, this eleventh day of October, in the year 1839.

Fee, $8 50, p'd.

J. C. RODES,
*Cl'k F. C. C.*

Filed for record June 2d, 1840, and recorded June 24th, 1840.
JNO. RULAND, *Recorder.*

STATE OF MISSOURI, *County of St. Louis, ss:*

I, the undersigned, recorder for said county, certify that the foregoing is a true copy of a deed from H. Clay to Ann McRee et al., the certificate of acknowledgement, and the date of filing and recording, as the same remains of record in my office in book "M," No. 2, page 260.

Witness my hand and official seal, at office, this the 23d day of November, 1863. A. C. BERNOUDY, *Recorder*,
[L. L.] Per J. CONRAD, *Deputy*.
[U. S. stamp.]

20. Deed of Ann F. McRee and others to Samuel McRee, dated July 4th, 1836, as follows:

*Deed of Ann F. McRee et al. to Samuel McRee.*

This indenture, made this 4th day of July, in the year of our Lord 1836, between Ann F. McRee, and James F. McRee, and Mary A. McRee, his wife, of the county of New Hanover, in the State of North Carolina, of the one part, and Samuel McRee, at present of the county of St. Louis, and State of Missouri, witnesseth: That whereas William McRee, late of the State of Missouri, died intestate, seized and possessed of one or more tracts or parcels of land in the State of Missouri; and whereas the said Ann McRee, as the mother, and James F. McRee, as one of the brothers of the said William McRee, are, by the laws of said State of Missouri, two of the heirs at law of the said William, and as such entitled each to one undivided third part of the lands of which the said William died seized and possessed as aforesaid: Now, therefore, the said Ann McRee, James F. McRee, and Mary A. McRee, the wife of the said James F. McRee, for and in consideration of the sum of sixteen hundred dollars, to them in hand paid by the said Samuel McRee at and before the sealing and delivery of these presents, the receipt whereof they do hereby acknowledge, and are therewith fully satisfied, content, and paid, have granted, bargained, sold, aliened, enfoeffed, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, enfoeff, convey, and confirm, unto the said Samuel McRee, and his heirs, all the real estate situate in the State of Missouri, of which the said William McRee died seized and possessed as aforesaid, and more particular a certain tract or parcel of land situate, lying, and being near the town of St. Louis, bordering on the commons of said town, in the State of Missouri, said to contain seven hundred arpens, more or less, hereby remissing and releasing all and whatsoever right, title, interest, and property, claim or demand, which the said Ann McRee and James F. McRee, or either of them, have or may have of, in, and to the said lands as heirs at law as aforesaid: To have and to hold the said lands, together with all and singular the rights, privileges, and appurtenances to the same belonging, or in any wise appertaining, and all the right, title, interest, and property, claim and demand, of the said Ann and James, of, in, and to the same, to the said Samuel McRee, his heirs and assigns forever. And the said Ann McRee and James F. McRee, for themselves and their, and each of their, heirs and executors, do covenant and agree with the said Samuel McRee, his heirs and assigns, that they will forever warrant and defend the said bargained premises to the said Samuel McRee, his heirs and assigns, against the lawful claims of all and every person claiming title to the same by, through, or under them.

In witness whereof the said Ann McRee, James F. McRee, and Mary A. McRee have hereunto set their hands and seals this 4th day of July, in the year of our Lord 1836.

ANN McREE. [SEAL.]
MARY McREE. [SEAL.]
JAMES F. McREE. [SEAL.]

Signed, sealed, and delivered in the presence of—
WILLIAM A. WRIGHT.

STATE OF NORTH CAROLINA,
*County of New Hanover:*

Be it remembered that this day personally appeared before the undersigned, clerk of the superior court of law for the county of New Hanover as aforesaid, Ann McRee, James F. McRee, and Mary A. McRee, his wife, all of whom are personally known to me to be the persons whose names are subscribed to the foregoing instrument of writing as parties thereto, who severally subscribed the said instrument of writing in my *presents*, and acknowledged the same to be their act and deed for the purposes therein expressed; she, the said Mary A. McRee, wife of the said James F. McRee, being by me first made acquainted with the contents of said conveyance, and acknowledge, on an examination apart from her husband, that she executed the same freely and without compulsion or undue influence of her said husband.

In testimony of all which I have hereunto set my hand and affixed the seal of said court, at office, in Wilmington, this twelfth day of July, in the year of our Lord 1836.

WILLIAM A. WRIGHT, *Clerk.*

Filed for record 29th November, 1836. Recorded 5th January, 1837.
JNO. RULAND, *Recorder.*

STATE OF MISSOURI,
*County St. Louis, ss:*

I, the undersigned, recorder for said county, certify that the foregoing is a true copy of a deed from Ann McRee et al. to Samuel
61 McRee, the certificate of acknowledgment, and the dates of filing and recording, as the same remains of record in my office in book Y, page 491.

Witness my hand and official seal this 23d day of Nov., 1863.

A. C. BERNOUDY, *Recorder,*
Per J. CONRAD, *Deputy.*

[U. S. stamp.]

21. Transcript of record in the St. Louis circuit court, in the suit of Samuel McRee against Edward Hempstead and als., and heirs of Hertzog, and heirs of Wilt, as follows:

To the St. Louis circuit court, sitting as a court of chancery:

Humbly complaining, your orator Samuel McRee, of the Army of the United States, states that heretofore, and some time in the August term of the St. Louis circuit court, in the year 1821, one Joseph Hertzog filed his bill of complaint in the same court, wherein he stated that in the month of June, in the year one thousand eight hundred and eleven, the said Hertzog, then residing in the city of Philadelphia, agreed with one Christian Wilt, his nephew, who had been raised in said Hertzog's store, and was then residing at St. Louis, but since deceased, to form a copartnership in the trade and business of selling merchandise in the then Louisiana Territory, and also in whatever other business they might choose to pursue in said Territory, the terms of which partnership were these: the said Hertzog was to furnish all the capital, purchase the goods at Philadelphia and elsewhere at the eastward, attend to the transportation of the same, and in general to perform all those things which necessary and proper as a partner residing at the eastward; the said Christian Welt, on his part, was to reside at and to

superintend all the business of the concern at St. Louis and elsewhere in said Territory, for which he was to have and receive one-third of the profits and suffer one-third*e* of the losses; that, in pursuance of this understanding and agreement, it was further consented by the said Hertzog that the name and style of the firm might be as the said Christian Wilt might deem fit, who thereupon adopted the style of "Christian Wilt," under which name and style they commenced business at St. Louis and elsewhere in the now State *State* of Missouri, and continued with much success till the fall of 1818, when the said parties agreed to take into their said firm Andrew Wilt, the brother of the said Christian Wilt. And your orator further shews that, during the partnership of "Christian Wilt" aforesaid, the said Wilt with the goods and partnership funds purchased a considerable real estate for and on account of the said firm, as the books of said firm will shew, the title deeds to which the said firm of Christian Wilt always took in the name of said firm of "Christian Wilt;" that in this way he purchased, amongst other considerable real estate situate in Missouri and Illinois, a New Madrid certificate, issued by the recorder of land titles of the United States to James Y. O'Carroll or his legal representatives,
62 (No. 150,) which was afterwards located by said Wilt on a tract of land, which is described as follows: A certain tract or parcel of land situate, lying, and being about three and a half miles southwest of the town of St. Louis, in the prairie called the Barriere des Noyer, containing the quantity of six hundred and forty acres, be the same more or less, it being a certain location made by the said Christian Wilt by virtue of a certain New Madrid certificate, so called, the number whereof is one hundred and fifty, dated November 30th, 1815, in the name of James Y. O'Carroll, or his legal representatives, all of which will more fully appear by reference to said location, in the office of the surveyor of the United States for Missouri, Illinois, and Arkansas, and to the deed of transfer of said certificate from James Tanner, as the legal representative of said O'Carroll, to said Christian Wilt, recorded in the recorder's office of St. Louis County, book H, pages 237 and following.

And the said bill of complaint set forth and described other real property as having been purchased by said Wilt with the same funds and to the same uses, which said property it is not necessary herein to describe. And the said bill then went on to shew that the said partnership continued as aforesaid until the fall of 1818, when said Joseph Hertzog agreed to advance for the said Andrew Wilt, since deceased, his share of the capital stock, to wit, one-third; and the said Christian Wilt and Joseph Hertzog agreed that said Andrew should be taken in as equal third copartner in the said firm at St. Louis, and that the whole effects, credits, and goods, and stock in trade, in the now State of Missouri, of the said firm of Christian Wilt, should form the stock of the new firm to be styled C. & A. Wilt & Co., which last firm continues till the unfortunate death of said Andrew Wilt and Christian Wilt, in the summer of 1819, during the existence of which last-mentioned partnership they made no profits, and, on the contrary, lost much. And the said Hertzog further stated in his said bill of complaint that said Christian Wilt died without there having been any settlement of the original firm, which had contracted some debts, most of which remained then still unsettled; and that the said firm of "Christian Wilt" had been re-established in that name since the death of the said Andrew, inasmuch as the said firm of C. & A. Wilt & Co. had made no profits, and as all the capital stock of the share of said Andrew was advanced

by said Hertzog. Said bill further alleged that said Christian Wilt died intestate, leaving as his next of kin, and only heir and legal representative, his infant son, George Wilson Wilt, then aged about four years, the wife of said Christian having died about four years previously; and that Charles S. Hemstead, (the brother-in-law of Christian,) and who said bill prayed might be made defendant thereto, administered on the estate of said Christain Wilt, deceased, and was also, by the circuit of the county of St. Louis aforesaid, duly appointed guardian to said George W. Wilt, who was then residing with his said guardian in St. Louis. Said bill furthermore set forth that it had become necessary to secure some debts and pay others of said firm of Christian
63 Wilt by mortgaging and selling some of the real estate above mentioned, which could not be done legally so long as the title of said real estate was in the heir of said Christian Wilt, out of whom it could not be divested but by said court of chancery. In tender consideration whereof, and forasmuch as said Hertzog, the complainant, could not have adequate relief except in a court of chancery, therefore the said Hertzog therein prayed that said Charles S. Hemstead, as administrator and guardian as aforesaid, might be made to answer thereto; and that on such answer said court would order and decree that the said Hemstead, as guardian as aforesaid, should convey and transfer by deed all the real estate mentioned in said bill to the said Hertzog, as surviving partner of said firm of "Christian Wilt," for the purposes aforesaid; and the said Hertzog made oath of the truth of the statements of said bill, as appears by his written affidavit to said bill of complaint; and your orator further states that, during the same term of said court, said Hemstead, guardian as aforesaid, filed an answer to said bill of complaint, wherein it was stated that he admitted the facts stated in said bill of complaint to be true to the best of his knowledge, information, and belief, and could urge no reason why the prayer of said bill should not be granted, if said court should think proper so to do, which said answer was sworn to by said Hemstead, and was signed by him as guardian as aforesaid.

And your orator further says that, at the same August term in the year 1821, the said cause by consent came on to be heard upon the bill and answer, and a decree was thereupon entered reciting the substance of said bill, and, among the rest, the tract of land before described, and then stating that said court did think fit, and did order and decree, and that it was thereby accordingly ordered and decreed, that said Charles S. Hemstead, as guardian of said George W. Wilt, infant and sole heir of Christian Wilt, deceased, should convey and transfer the several pieces and parcels of land and real estate described in said bill to said Joseph Hertzog, as surviving partner of said firm of Christian Wilt, and for the use of said firm; and that said Hemstead, a guardian as aforesaid, should execute and deliver the proper and necessary deed ordereds for the same; and that said complainant Hertzog should pay all costs and charges of said suit. And your orator further states that afterwards, on or about the 10th of September, 1821, said Hemstead executed and delivered a deed to said Hertzog, wherein he recites the said proceedings in chancery and said decree, and states, in pursuance thereof, he transfers, releases, and assigns to said Hertzog, as such surviving partner as aforesaid, all the real property described in said bill of complaint, and among other the tract of land before described, to have and to hold the same to him, said Hertzog, as such surviving partner, and to his heirs and assigns forever, which deed was duly acknowledged and recorded.

And your orator further states that afterwards, the said Joseph Hertzog being indebted, as such surviving partner as aforesaid, to Henry Clay, executor of James Morrison, deceased, in the sum of two
64 thousand two hundred and eighty-six dollars for his debt, and also in the further sum of one hundred and forty-seven dollars and forty-five cents for his damages, for the detention thereof, the said Henry Clay, executor as aforesaid, had judgment for the same in the St. Louis circuit court, and execution issued thereon from the clerk's office of said court, bearing date the 30th day of December, 1824, by virtue of which execution the sheriff of said county levied on certain parcels of the real estate belonging to *to* said Joseph Hertzog, and among others the tract of land before described; and on Thursday, the 10th day of February, 1825, did proceed to sell the same, when the same was sold to the said Henry Clay; and the said sheriff of St. Louis county, by deed, dated the 17th day of May, 1825, conveyed the said tract of land to the said Henry Clay, executor of James Morrison, in fee-simple, a copy of which deed is herewith filed, marked Exhibit A, No. 1; and the said Henry Clay afterwards, by his deed, duly executed, dated the 11th day of October, in the year 1839, conveyed the said tract of land to Ann McRee, James F. McRee, and your orator Samuel McRee, as the heirs and legal representatives of William McRee, deceased, to whom said Clay had sold said land, which said deed is herewith filed, marked Exhibit B, No. 2; and the said Ann McRee and James F. McRee afterwards, by their deed, dated the —— day of ——, in the year 1830, [1831,] conveyed their interest in said land to your orator, which deed is hereby filed, marked Exhibit C, No. 3. By virtue of which several deeds and conveyances your orator supposed he had the complete legal title vested in him to the tract of land before described, at least such title as had vested in said George Wilson Wilt on the death of the said Christian Wilt, but is informed and believes that such is not the fact, on the ground that said proceedings in chancery did not make the said George W. Wilt a party to them, either plaintiff or defendant, and that the said decree was not as the law in such cases required to be made to pass the title.

Your orator alleges that the equitable title to said lot is unquestionably vested in him by means of the premises, and that he is entitled to the decree of this court to obtain the legal title to the same.

And your orator further shews that said George Wilson Wilt departed this life in April, 1823, and the heirs of the said George W. Wilt, who of the whole blood are Edward Hemstead and Charles S. Hemstead, now residing in Galena, Illinois, infants and sons of Rachel, now deceased, who was a sister of said Christian Wilt, and of the half blood Chatarine Hertzog, widow of said Joseph Hertzog, and half sister of said Christian, now residing in Illinois; Elizabeth; wife of Michael Baker, residing in Pennsylvania; also half sister of said Christian Abraham Wilt, residing in Philadelphia; also Ann Ritter, wife of George Ritter, residing in Philadelphia; and further, that said Joseph Hertzog died in August, 1827, leaving as heirs his daughter Mary, marriade to John Dougherty, residing at Liberty, Missouri; his daughter Elizabeth, now the widow of William Collins, deceased, residing in Illinois; his daughter Ann,
65 marriade to W'm N. Wickliff, both of whom reside in Illinois; and his daughter Rachel, marriade to Philip St. George Cook, an officer of the United States Army, who is not a resident of the State of Missouri.

In tender consideration of the premises, and forasmuch as your orator is remediless at law, and can obtain relief only in a court of

chancery, where such matters are properly cognizable, to the end that said Edward and Charles S. Hemstead, jr., Chatarine Hertzog, Michae Baker, and Elizabeth, his wife, George Retter, and Ann, his wife, Abraham Wilt, John Dougherty, and Mary, his wife, Elizabeth Collins, Philip St. George Cook, and Rachael, his wife, and William N. Wickliff, and Ann, his wife, the legal heirs of said Christian Wilt and Joseph Hertzog, and defendants herein, may true, full, and perfect answer make to all and *and* singular the premises, as if here again repeated and they interrogated thereto, and in particular that they may answer and state whether or not such partnership did not exist between said Joseph and Christian, as hereinabove set forth, as to the time, circumstances, and stipulations; and whether said tract of land before described was not bought with said partnership funds; and whether said Wilt died at the time and in that behalf above stated, and, if not, when; and whether said George Wilson Wilt was not the only child and heir of said Christian, and did he not die at the time in that behalf above stated, and, if not, when; and whether the persons above named as present heirs of said George Wilson Wilt are not in truth his heirs; and whether they are his only surviving heirs, and, if not, who are they, and where are they, his heirs; and whether said Joseph did not die at the time in that behalf above stated, and, if not, when, and who are his heirs; and whether the persons above named in that behalf are not his heirs, and, if others, who are they; and whether such proceedings in chancery, as above set forth, did not take place, such bill, answer, and decree; and whether such deeds were not executed as hereinabove specified, and, if not, what, how different, and what deeds; and whether said firm of Christian Wilt was not at his death largely indebted; and whether the said debt above specified was not due from said Hertzog for and on account of said firm of "Christian Wilt," and therefore ought to have been paid out of said partnership funds, and may be decreed to make, execute, and deliver to your orator a deed, good and sufficient in law, for transferring to your orator, his heirs or assigns forever, all right, title, interest, and estate of and in the tract of land before described, with its privileges and appurtenances, which decended to them, respectively, as heirs of George Wilson Wilt and Joseph Hertzog; or that this court will decree that all such title and interest in said tract of land in law or in equity as resides and is vested in said defendants, and each of them, as heirs of said George Wilson Wilt, or of said Joseph Hertzog, shall pass to and be vested in your orator, and that a supœna may issu, summoning each of said persons above named as defendants, to wit, Edward Hemstead and Charles S. Hemstead, Catharine Hertzog, Michal Baker, and Elizabeth, his wife, George Ritter, and Ann, his wife, Abraham
66 Wilt, John Dougherty, and Mary, his wife, William Collins, and Elizabeth, his wife, Philip St. George Cook, and Rachel, his wife, and William M. Wickliff, and Ann, his wife, to be and appear in this honorable court on a day named, there to abide by such order and decree as shall be made in the premises; and that such other and further relief may be granted as to this court shall seem agreeable to equity and good conscience, &c.

And your orator will ever pray, &c.

GAMBLE & BATES,
*Solicitors for Complainant.*

*Summons.*

STATE OF MISSOURI, *County of Saint Louis, ss:*

To the sheriff of Clay County, greeting:

We command you to summon John Dougherty, and Mary Dougherty, his wife, if they be found in your county, that they be and appear before the judge of our circuit court on the first day of the next term thereof, to be held at the city of St. Louis, within and for the county of St. Louis, on the third Monday of November next, then and there to answer unto Samuel McRee of his bill in chancery; and have you then and there this writ.

Witness John Ruland, clerk of our said court, with the seal thereof hereto affixed, at office, in the city of St. Louis, this twenty-third day of March, in the year of our Lord eighteen hundred and forty-four.

JOHN RULAND, *Clerk*,
By CHAS. B. CLEMENTS, *D. C.*

*Sheriff's return.*

I, John Baxter, sheriff of Clay County, hereby certify that I executed the within writ by reading a certified copy of the original bill of complaint, accompanying of said writ and writ of summons, to the within-named John Dougherty, and Mary Dougherty, his wife, in Clay County, on the 10th day of August, A. D. 1844, and by delivering to John Dougherty the certified copy of the original bill accompanying said writ, he being the first summoned in Clay County on the said 10th day of August, A. D. 1844.

JOHN BAXTER,
*Sheriff of Clay County, Mo.*

*Affidavit of non-residence.*

SAMUEL MCREE
*vs.*
EDWARD HEMSTEAD ET ALS.

Hamilton R. Gamble, being duly sworn, upon his oath says that he has made enquiries to ascertain the places of residence of the different defendants in this case, and he says that he verily believes that
67 Edward Hemstead, Charles S. Hemstead, jr., Catherine Hertzog, Michael Baker, and Elizabeth, his wife, George Ritter, and Anne, his wife, Abraham Wilt, Elizabeth Collins, Philip St. George Cook, and Rachel, his wife, William N. Wickliff, and Anne, his wife, are *now* [non-]residents of the State of Missouri.

H. R. GAMBLE.

Sworn to and subscribed before me March 23d, 1844.

JOHN RULAND, *Clerk.*

*Proof of publication.*

In the St. Louis circuit court, November term, 1845.—Monday, November 24th, 1845.

SAMUEL MCREE
*vs.*
EDWARD HEMSTEAD, CHARLES S. HEMSTEAD, Catharine Hertzog, Michael Baker, and Elizabeth, his wife, George Ritter, and Anne, his wife, Abraham Wilt, John Dougherty, and Mary, his wife, William Collins, and Elizabeth, his wife, Philip St. George Cook, and Rachel, his wife, and William N. Wickliff, and Anne, his wife.

Now at this day comes the complainant by his solicitor, and on his motion, and it appearing to the court that the order of publication heretofore made in this cause has not been published, it is therefore ordered that the same be renewed, and that the above-named defendants, except John Dougherty, and Mary, his wife, non-residents of the State of Missouri, be, and they are hereby, notified that said complainant has filed his bill of complaint against them, the allegations and substance whereof are and object is to obtain decree against the said defendants, to restore, make, execute, and deliver a deed or deeds good and sufficient in law for transferring to said complainant, his heirs and assigns forever, all the right, title, and interest of the defendants which descended to them as heirs of George Wilson Wilt, or of Joseph Hertzog, in and to a certain tract or parcel of land situate, lying, and being about three and a half miles southwest of the town of St. Louis, in the prairie called the Barriere des Noyer, containing the quantity of six hundred and forty acres, be the same more or less, it being a certain location made by Christian Wilt by virtue of a certain New Madrid certificate, so called, the number whereof is one hundred and fifty, dated November 30th, 1815, in the name of James Y. O'Carroll or his legal representatives, which will more fully appear by reference to said location in the office of the surveyor of the United States for the States of Missouri, Illinois, and Arkansas, and to the deed of transfer of said certificate from James Tanner, as the legal representative of said O'Carroll, to said Christian Wilt, recorded in the recorder's office of St. Louis County in book
68 H, page 237 and following, or that said court will decree the title to said tract of land to pass and be vested in said complainant; which said tract of land the said complainant claims as having acquired the title under a decree of the St. Louis circuit court in chancery, erroneously entered in a suit of Joseph Hertzog against the said George Wilson Wilt.

And it is further ordered that said defendants be notified that, unless they be and appear before this court at the next term thereof, to be begun and held at the city of St. Louis, for the county of St. Louis, on the third Monday of April next, and on or before the sixth day thereof plead, answer, demur, or except to the said bill, the same will be taken against them for confessed.

And it is further ordered that a copy hereof be published, according to law, in some newspaper printed in the city of St. Louis.

A true copy.
Attest: JOHN RULAND, *Clerk.*

GAMBLE & BATES, *Attorneys.*

January 24, 1846.—w&wsat.

Messrs. GAMBLE & BATES,

1845. To ST. LOUIS AMERICAN, DR.

Jan. 24. To publishing the annexed adver. 8w..... $11 25

Received payment Apr. 22d, 1846.

JA. M. JULIAN & CO.,
Per OLIVER HARRIS.

STATE OF MISSOURI, *County of St. Louis, ss:*

Personally appeared before the undersigned, justice of the peace within and for the county of St. Louis, Ooliver Harris, who, being duly sworn, on his oath says that he is one of the publishers of the St. Louis American, and that the advertisement annexed was published eight weeks in said paper, as follows:

The first insertion was on the 24th of Jan., 1846, in No. 40; the second on the 31st Jan., in No. 46; the 3d on the 7th of Feb., No. 52; the 4th on the 14th Feb., No. 58; the 5th on 21st Feb., No. 64; the 6th on the 28th Feb., No. 70; the 7th on the 7th March, No. 76; and the 8th on the 14th March, 1846, in No. 82.

OLIVER HARRIS.

Sworn to and subscribed before me this 22d day of April, 1846.
ALPHONSO WETMORE, *J. P.*

69 *Decree.*

In the Saint Louis circuit court, in chancery, April term, 1848.—June 30th, 1848.

SAMUEL MCREE
*vs.*
EDWARD HEMSTEAD, CHARLES S. HEMSTEAD, Catherine Hertzog, Michael Baker, and Elizabeth Baker, his wife, George Ritter, and Anne, his wife, Abraham Wilt, John Dougherty, and Mary Dougherty, his wife, Elizabeth Collins, Philip St. George Cook, and Rachael Cook, his wife, William H. Wickliff, and Anne, his wife.

And now at this day comes the complainant by his solicitor, and it appearing to the court that the defendants have all been duly notified, according to law, by publication and by process, and that decrees have been entered against the said defendant upon their failure to file their answer as required by law, taking the complainant's bill confessed, and there being no answer filed by any of said defendants, the court doth think fit to order, adjudge, and decree, and it is accordingly ordered, adjudged, and decreed, that the decrees nisi, heretofore entered, be made, and they are hereby made, absolute, against all the defendants.

And it is further decreed that all right, title, interest, in and to the tract of land in the complainant's bill described, being a certain tract or parcel of land situate, lying, and being in Saint Louis County, about three and a half miles southwest of the former town of Saint Louis, in the prairie called the Barriere des Noyer, containing the quantity of six hundred and forty acres, being the tract located under a New Madrid certificate, number one hundred and fifty, dated the thirtieth day of

November, in the year eighteen hundred and fifteen, in the name of James Y. O'Carroll, or his legal representatives, pass from all the said defendants to the said complainant, and be vested in him, said Samuel McRee, and his heirs, in fee-simple, and that the complainant pay the costs of this cause, and that execution issue therefor.

STATE OF MISSOURI, *County of St. Louis, ss:*

I, Stephen Rice, clerk of the circuit court, certify the foregoing to be a true copy of a decree in chancery made in the above-entitled cause as fully as the same remains of record in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office, in the city of Saint Louis, this 24th day of November, A. D. 1863.

STEPHEN RICE, *Clerk.*

70 22. Deed of Samuel McRee and wife to Pierre Chouteau, dated the 30th August, 1838, as follows:

*Deed of Samuel McRee and wife to Pierre Chouteau, jr.*

This deed, made this thirtieth day of August, in the year eighteen hundred and thirty-eight, witnesseth: That Samuel McRee, of the Army of the United States, and Mary McRee, his wife, for and in consideration of the sum of one hundred and fifty dollars, to them in hand paid, the receipt whereof is hereby acknowledged, have bargained, sold, released, quitclaimed, and conveyed, and by these presents do bargain sell, release, quitclaim, and convey, unto Pierre Chouteau, junior, of the city of St. Louis, and his heirs, the following described tract or parcel of land situate, lying, and being in the county of St. Louis, and State of Missouri, bounded as follows, to wit:

Beginning on the eastern line of the League square, granted and confirmed to Charles Gratiot, at a point where the southern line of the land confirmed to Susan Dubriel intersects the said line of the League square; thence, with the line of the said League square, south eight degrees forty minutes west forty-eight chains to a point in said line, corner of Susan Jannette's claims; thence south eighty-three degrees thirty minutes east thirteen chains sixty-four links to a post; thence north eight degrees forty minutes east forty-five chains ninety-seven links to a post; thence north seventy-five degrees west thirteen chains seventy links to the beginning, containing the quantity of sixty-four acres, being part of the tract located under a New Madrid certificate, issued to James Y. O'Carroll, or his legal representatives, to be taken off the western end of said tract, and is the same parcel of land conveyed to said Pierre Chouteau, junior, by Robert Wash, as trustee of Joseph Hertzog, by deed, recorded in the recorder's office of Saint Louis County, in book M, page 172 and following: To have and to hold the above-described tract of land to the said Pierre Chouteau, junior, and his heirs forever.

In testimony whereof the said Samuel McRee and wife have hereto set their hands and seals the date before written.

SAMUEL McREE. [SEAL.]
MARY McREE. [SEAL.]

STATE OF MISSOURI, *County of St. Louis, ss:*

Be it remembered that, on this thirty-first day of October, in the year

of our Lord eighteen hundred and thirty-nine, before me, a justice of the peace within and for the county aforesaid, appeared Samuel McRee, and Mary, his wife, who are both personally known to me to be the persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and severally acknowledged the same to be their act and deed for the purposes therein mentioned; she, the said Mary, being made acquainted with the contents of said conveyance, acknowledged, on an examination apart from her husband, that
71 she executed the same and relinquishes her dower in the real estate therein mentioned freely and without compulsion or undue influence of her said husband.

Taken and certified the day and year last aforesaid.

J. WALSH, *Justice.*

Filed for record November 8th, 1839, and recorded November 11th, 1839.

JOHN RULAND, *Recorder.*

STATE OF MISSOURI, *County of St. Louis, ss:*

I, the undersigned, recorder in and for the county aforesaid, certify that the foregoing is a true and correct copy of a deed from Samuel McRee to Pierre Chouteau, jr., as also of the acknowledgment thereof, and of the date of filing and that of recording of same, as the same remain of record in my office in book K, page 12.

Witness my hand and official seal this 2d day of May, 1863.

[L. S.] A. C. BERNOUDY, *Recorder,*
Per J. CONRAD, *Deputy.*

[U. S. stamp.]

23. Confirmation to Joseph Calve's legal representatives for 2 by 40 arpents in Cul de Sac, as follows:

*Confirmation to J. Calve's representatives.*

A.

Opinions of the recorder of land titles for Missouri Territory as to claims entered under act of June 13th, 1812, and proven before 1st January, 1814, as provided by the act of the 3d March, 1813; comprehending also the claims in the late district of Arkansas, which, by act of 2d August, 1813, were permitted to be entered untill 1st January, 1814, and proven untill 1st of July, 1814, together with the extensions of quantity provided by 4th section of the act of 3d March, 1813, and confirmations under the act of 12 April, 1814:

| Warrant or order of survey. | Survey. | Notice to the recorder, by whom. |
|---|---|---|
| Prov. land book 1, p. 17. | Not platted. | Joseph Calve's representatives. |

| Quantity claimed. | Where situated. |
|---|---|
| 2 by 40 arpents. | F. 153, Field of St. Louis, B. Prairie. |

| Poss'n, inhab'n, and cult'n. | Opinions of the recorder. |
|---|---|
| Poss'n and inhab'n prior to 1803. | Confirmed 80 arpents, to be surveyed. |

72

RECORDER'S OFFICE,
*St. Louis, 24th April*, 1851.

I certify that the above is correctly transcribed from pages 1 and 7, in book No. 1, being one of the five small books in this office, with the following endorsement on the first and also on the fifth book, believed to be in the handwriting of Frederick Bates, to wit:

"These five small books are originals in the proper handwriting of the undersigned, being his decision on land claims since the adjournment of the late board. They were arranged and fairly transcribed for report to the Commissioner of the General Land Office, but not yet recorded in the books, because they have no authority till sanctioned by Government.

"St. Louis, November 1st, 1815.

"FREDERICK BATES,
"*Recorder of Land Titles.*"

ADOLPHE RENARD,
*U. S. Recorder of Land Titles in the State of Missouri.*

CALVE.—Du trente avril, mil sept soixante huite, sur la demande de Joseph Calve, "habitante a St. Louis," nous luy avons concede et conceddons a titre de propriete une terre de deux arpents de face sur quarante arpents de profondeur situee a la Grand Prairie, tenante d'un cote a la veuve Marechal et de l'autre coste a la petite Rivieur, aux conditions d'etabler la dite terre sous l'an & jour. Donne a St. Louis la trente avril, mil sept cent soixaute huit. See Levre Terrien No. 1, folio 17.

ST. ANGE LABUXIERE.

Minutes of the recorder of land titles, acting as commissioner under the act of Congress, entitled "An act making further provisions for settling the claims to land in the Territory of Missouri," passed the 13th day of June, 1812, and other acts subsequently passed.

FREDERICK BATES,
*Commissioner.*

ST. LOUIS, *December 31st*, 1813.

Joseph Calve claiming 2 by 40, Big Prairie Fields, St. Louis con. No. 1, fol. 17. Auguste Chouteau, sworn, says this lot was culivated 40 years ago, and till fence was taken down. Conf'd O. S. See Bates' Minutes, pages 133, 141, and 141.

OFFICE OF THE RECORDER OF LAND TITLES,
*St. Louis, 24 September*, 1856.

I certify that the above is, with the attached paper marked A, a full and correct transcript from the books, records, files, and documents in this office of the claim of Joseph Calve's representatives to 2 by 4 arpents of land in the fields of Saint Louis, Big Prairie.

ADOLPHE RENARD,
*U. S. Recorder of Land Titles in the State of Missouri.*

73 Translation of the concession to Joseph Calve, as given in French at the beginning of the foregoing page, copied from Livre Terrien No. 1, fo. 17.

On the demand of Joseph Calve, inhabitant of St. Louis, made on the thirtieth (day of) April, one thousand seven hundred and sixty-eight, we have conceded and concede to him in fee-simple a piece of land, of two arpens in front by forty arpens in depth, situate in the Grand Prairie; bounded on one side by widow Marechal, and on the other side by the Little River, under the conditions to settle upon said land within a year and a day.

Given in St. Louis on the thirtieth of April, one thousand seven hundred and sixty-eight.

ST. ANGE LABUXIERE.

Translated Sept. 28th, 1865, by Fred'k Mosberger.

(See plat. Here follows map marked page 97. )

DESCRIPTION.—Commence at the northwest corner of the lot, the southwest corner of Hebert, dit Berry, Tabeau's legal representatives' lot, a limestone 3½ inches thick, 14 wide, and 14 inches long, set 11 inches deep, the edge southeastward, and make a cross on the top: thence south 74 east, along the southern boundary of the lot of said Tabeau's representatives, which is the northern boundary of this lot; 13.93 chains a fence bears north 8½ east; 67.53 chains the road leading from Manchester northward to St. Louis; 84.13 chains a branch, 8 links wide, runs northward; 85.03 chains a point, from which the southeast corner of Joachim Roy's legal representatives' lot bears north 15¼ east, 29⅝ chains distant; 116.67 chains, the northeast corner of this lot and southeast corner of the lot of said Tabeau's legal representatives, from which I set a limestone 3 inches thick, 12 inches wide, and 16 inches long, set 12 inches deep, with the edge northwestward: thence south 9½ west, along the eastern boundary of the lot; 5.87½ chains set a limestone 2¾ inches thick, 14 inches wide, and 14 inches long, set 11 inches deep, the edge northwestward, the southeast corner of the lot, from which the northeast corner of Flores, being the northeast corner of the Common Fields of Prairie des Moyers, bears south 3¼ west, 155.4 chains distant: thence north 74 west, along the southern boundary of this lot; 33.70 chains a branch 10 links wide bears northward: 53.30 chains the said road bearing northeastward to St. Louis; 102.65 chs. a fence bearing north 8 east; 111.83 chains a point, from which the northeast corner of the brick chimney of a dwelling-house bears south 63½ west, 53½ links distant; 116.80 chains, the southwest corner of the lot on the eastern boundary of Gratoit's survey No.—, for which I set a limestone 4½ inches thick, 10 inches wide, and 20 inches long, set 10 inches deep, the edge southeastward, and make a cross on the top, from which a cottonwood, 6 inches diameter, bears south 83½ west, 89 links: thence north 9½ east, along the eastern boundary of Gratoit's said survey, 5.83¼ chains, to the beginning northwest corner, from which a cottonwood, 12 inches diameter, bears north 53 west, 272 links distant.

74 OFFICE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSOURI,
*St. Louis, October 8th*, 1856.

The foregoing is correctly copied from the original field-notes returned by Joseph C. Brown, on file in this office.

JOHN LOUGHBOROUGH,
*Surveyor General.*

(See plat. Here follows map marked page 98.)

SURVEYOR'S OFFICE,
*St. Louis, 31st of January,* 1845.

The accompanying plat of township 45 north of the base line, range 7 east of the 5th principal meridian, is strictly conformable to the field-notes of the surveys thereof on file in this office, which have been examined and approved.

(Signed) SILAS REED,
*Surveyor of the Public Lands in the State of Illinois and Missouri.*

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
*St. Louis, Sept. 28th,* 1865.

The above plat of survey, No. 2498, of a location under New Madrid certificate No. 150, in the name of James Y. O'Carroll, or his legal representatives, and of the interferences therewith, namely, survey No. 3309, in the name of Calve; of survey No. 3308, in the name of Hubert, dit Tabeau; of survey No. 3307, in the name of Joachim Roy; of survey No. 2973, in the name of Amable Guyon, or Veuv Lecompte's legal representatives; of survey No. 3125 of the St. Louis Common; and of survey No. 3182, in the name of Joseph Mottard, or his legal representatives, together with the connection of the adjoining and surrounding surveys, as also the above certificate by Silas Reed, dated the 31st of January, 1845, are all correctly copied from the plat of township 45 north, range 7 east of the 5th principal meridan, as the same appears to be approved by the certificate above copied; which plat remains on file in this office.

FRED'K MOSBERGER, *Recorder.*

[U. S. stamp.]

The plaintiff objected to the admission in evidence of each and all of the documents, deed, decrees, and surveys offered by defendants, at the time when the same were offered respectively, on the ground that the same were void, incompetent, and irrelevant; but the same were admitted, to which the plaintiff excepted.

*Charles P. Chouteau's testimony.*

CHARLES P. CHOUTEAU, a witness for defendants, testified as follows:

I have examined the deed of the 30th August, 1838, from Samuel McRee and wife to Pierre Chouteau, jr. The land therein de-
75 scribed is on the west end of the O'Carroll tract, and embraces about fifty-four acres.

I was present at the survey by Cozzens, a good many years ago.

My father, Pierre Chouteau, jr., has been in possession of this land ever since I can recollect.

I recollect his being in possession as far back as 1826. He has always been in the sole possession of it. He has had servants. John Cook has been a servant of his since 1 January, 1851. There was no other servants there before Cook came, who are there now. Mr. Chouteau directs the management and carrying on of that farm.

He has a house on it. Mr. Cook resides on the other side of the River des Peres, outside the tract of land in controversy. Mr. Chouteau has used this as a place of summer resort. He has house servants

that remains there as his servants. The sixty-four acres have been enclosed with a worm fence and board fence.

I have resided on the place two or three summers, by Mr. Chouteau's invitation. Mr. Chouteau's servants and hired men were then on the place.

The house of Mr. Chouteau is on this place, built before I can remember.

On cross-examination witness said Mr. Cook is paid by defendant in money. He has no interest in the produce of the farm, nor in the stock of farming utensils.

He has no other interest. Some ten years ago Cook lived in a house on the place for a short time. It was a servant's house that Cook lived in.

*P. A. Berthold's testimony.*

PIERRE A. BERTHOLD, a witness on the part of the defendants, testified as follows:

I have known Mr. Chouteau, the defendant, since 1830. Pierre Chouteau, jr., has been in possession of the land in controversy since 1830. He had it fenced; had house on it and servants in it.

*Jno. R. Shepley's testimony.*

JOHN R. SHEPLEY, a witness for the defendants, testified as follows:

I was counsel for Pierre Chouteau, jr., in suit in the United States circuit court, brought by Holmes against Chouteau and against others to recover portions of the James Y. O'Carroll tract. There was other suits of the same plaintiff against Mrs. McRee and her tenants. Mrs. McRee had Mr. Gibson and Mr. Geyer for her counsel.

The cases against Mrs. McRee's tenants stood earlier on the docket. Mr. Gibson and myself consulted together before the trial came on, and we also consulted with Mr. Dayton, who was counsel for Mrs. McRee, I think. When the trial came on we consulted together, and during its progress. The deed of Ruddel to Tanner and Gillaspie for 550 arpents,
76 made in 1816, was objected to and ruled out, as I afterwards discovered, on account of a parcel of the description being omitted in the copy we had. Mr. Gibson and myself had a consultation in the court-room after the deed was rejected. At my suggestion, I think, it was agreed that Mr. Gibson, acting for Mrs. McRee, and I, acting for Mr. Chouteau, should get conveyance from the heirs of Ruddle, and from some of the heirs of Dameron; Mr. Gibson was to get the Ruddle heirs, and I the Dameron heirs. It was understood that we were to get these deed(s) for the joint benefit of Mrs. McRee and Chouteau.

I sent down Mr. Sedgwick to Tennessee and Mississippi, and paid him $150 to try and get the Dameron heirs, which sum Mr. Chouteau afterwards paid to me. My recollection is that the portion of the deed from Ruddle to Tanner and Gillispie, left out in our copy, was the reference in the description of the land conveyed; that it was confirmed to James Y. O'Carroll; thinks that H. R. Gamble was counsel for Mrs. McRee, but not present at that trial. I had no conversation with Mrs. MacRee. The conversation with Gibson was in court-room, at the counsel table, before the trial was ended. The evidence was through, or nearly through. Gibson was not counsel for Chouteau.

On cross-examination the witness said:

Mr. Gibson and myself made the agreement to attempt to procure both titles for the joint benefit of both parties.

I never acted for Mrs. McRee. I was attorney for Mr. Chouteau, and Mr. Gibson was attorney for Mrs. McRee.

There were none of Chouteau's cases tried. Mrs. McRee's case was tried, and the case then was taken to the United States Supreme Court, at Washington. I understood Mr. Gamble and Mr. Gibson appeared for Mrs. McRee at Washington.

Mr. Hill and myself were employed by Mr. Chouteau in the United States circuit court.

I don't know how much was paid to the Ruddel heirs for the deeds obtained from them.

I don't think Mr. Chouteau ever had an opportunity to pay any part of the consideration paid for these deeds.

Don't know that Chouteau and Mrs. McRee quarrelled. We made absolute agreement without conversing with our respective clients; don't know that Gibson ever acted as agent or attorney for Chouteau, further than arose from my agreement with him.

I acted as Chouteau's counsel only in the Holmes cases.

Gamble and Gibson argued the case at Washington. Chouteau, so far as I know, did not pay Geyer, Gamble, or Gibson.

The defendant here rested, and in rebuttal the plaintiff gave in evidence the following documents:

1. Certificate of annulment of survey No. 2498, dated 26 March, 1862, as follows:

*Certificate of annulment of sur. No.* 2498.

"It is hereby ordered that the transcript plat of survey No. 2498, in the name of James Y. O'Carroll, or his legal representa-
77 tives, under New Madrid certificate No. 150, and transmitted by Silas Reed, surveyor general of Illinois and Missouri, to the recorder of land titles, at St. Louis, on the 10th day of August, 1841, being erroneous in omitting to show the interference of other surveys with the same, being in contravention of the instructions of the Commissioner of the General Land Office, having been superseded by the correct plat of said survey, returned to said recorder by the undersigned on the 26th day of March, 1862, on which a new patent certificate, and a patent to Mary McRee, assignee of James Y. O'Carroll, has been issued, be, and the same is hereby, set aside, cancelled, and annulled."

OFFICE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSOURI,
*St. Louis, April 29th*, 1863.

I hereby certify that the above is correctly copied from the order issued by me April 2d, 1863.

W'M CUDDY,
*Surveyor General.*

To the giving of which in evidence defendants objected as irrelevant and incompetent, but court admitted the same, and defendants at the time excepted.

2. Order of Thomas S. Nelson, recorder of land titles, dated December, 1862, in relation to said survey, as follows

*Order of recorder of land titles, &c.*

(Copy.)

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
*St. Louis, Mo., December* 1862.

It is ordered that patent certificate No. 447, issued on the 16th day of August, 1841, in the name of James Y. O'Carroll, original claimant under United States survey No. 2498, under New Madrid certificate No. 150, for 640 acres, and delivered to General William Milburn, being in contravention of the directions of the Commissioner of the General Land Office, and having been erroneously issued, is hereby set aside and annulled, and declared to be void and of no effect.

THOMAS S. NELSON, *Recorder.*

OFFICE OF THE RECORDER OF LAND TITLES,
*St. Louis, May* 4, 1863.

I hereby certify that the above is correctly copied from a list containing abstracts of New Madrid locations on file in this office.

THOMAS S. NELSON,
*U. S. Recorder of Land Titles in the State of Missouri.*

To the reading of which in evidence defendants objected as being incompetent and irrelevant testimony; but the court admitted the same, to which the defendants at the time excepted.

78 3. Decisions of Commissioner of General Land Office, dated January 9th, 1863, as to U. S. survey No. 2498, as follows:

*Decision of Commissioner General of Land Office.*

(Copy.)

GENERAL LAND OFFICE,
*January 9th*, 1865.

SIR: Hon. C. Gibson has filed in this office your order dated December, 1862, declaring "Patent certificate No. 447, issued 16th August, 1841, in the name of James Y. O'Carroll, original claimant under United survey No. 2498, under New Madrid certificate No. 150, for 640 acres," to be set aside, and annulled as void and of no effect.

Another pat. cert., dated 26th March, 1862, numbered 494, having been issued in lue of the above mentioned, (No. 447,) and made the basis of a patent for the claim of O'Carroll, the pat. cert. No. 447, in regard to which you have issued the order of annullment, and which is on our files, will there remain inoperative.

Very respe., &c.,

J. M. EDMUNDS, *Comm'r.*

To. T. S. NELSON, Esq.,
*Recorder of Land Titles, St. Louis.*

OFFICE OF THE RECORDER OF LAND TITLES,
*St. Louis, May 4th*, 1863.

I hereby certify that the above is correctly transcribed from a letter, the original of which is on file in this office.

THOMAS S. NELSON.
*U. S. Recorder of Land Titles in the State of Missouri.*

4. Decisions of the Secretary of Interior, March, 1863, affirming above decisions, as follows:

*Decisions of the Secretary of the Interior.*

(Copy.)

DEPARTMENT OF THE INTERIOR,
*March 2d*, 1863.

SIR: Upon the application of C. Gibson, esqr., for an affirmance of your instructions, bearing date January 9th, 1863, to the recorder of land titles, St. Louis, Missouri, whereby patent certificate No. 447, in the case of O'Carroll, is declared inoperative, another patent certificate, No. 494, having been issued in lieu of the above mentioned, the object of this is to inform you that the aforesaid instructions are accordingly hereby affirmed, pursuant to the order of the Secretary of the Interior, and you will inform the recorder at St. Louis of the fact.

Very respectfully, your ob't s'v't,

W. J. OTTO,
*Assistant Secretary of the Interior.*

Hon. J. M. EDMUNDS,
*Commissioner of the General Land Office.*

79 OFFICE OF THE RECORDER OF LAND TITLES,
*St. Louis, May 4th*, 1863.

I hereby certify that the above is a correct transcript from a copy of a letter from W. J. Otto, Ass't Sec. of the Interior, to Comm'r J. M. Edmunds, dated 2d March, 1863, on file in this office.

THOMAS S. NELSON,
*U. S. Recorder of Land Titles in the State of Mo.*

5. General instructions of Comm'r of General Land Office as to transcript plats of surveys, 19th March, 1847, as follows:

*General instructions of Commissioner of General Land Office, &c.*

(Copy.)

GENERAL LAND OFFICE, *March 19th*, 1847.

SIR: In reference to the claim of Francis Cottard for 40 arpens to an "out lot," State Papers, D. Green, vol. 3, page 380, I herewith enclose for your information a copy of my letter of this date to the recorder at St. Louis.

Should the party claiming under Cottard propose to renew his application for a patent for survey No. 3183, in township 45 N., R. 7 E., it will be necessary, and you are requested, after full notice and opportunity afforded of being heard to all parties interested, to make a thorough examination into the various conflicts with said survey, and report the result, with all the evidence which may be presented, accompanied by your decision as to the validity or invalidity of each intereference.

{O'Carroll, N.M. 150.} One of the claims interfering with Cottard's is O'Carroll's New Madrid claim, L. C. No. 150, which is referred to in a letter from this office to the S. Gen'l of the 28th August, 1841, and in yours (A) of the 30th July, 1845.

All that portion of O'Carroll's location east of the "Saint Louis Common" line will yield 1st to the "Common" claim.

Besides this interference with O'Carroll, N. M. 150, are the following:

(2d) Sr. No. 2973.

(3d) Sr. No. 3307.

(4th) Sr. No. 3308.

According to S. Gen'l's letter A, of 30th July, 1845, the 2d, 3d, 4th, were proved before the recorder in 1825. The (5th) Sr. No. 3309, not confirmed. O'Carroll is also interfered with by (6th) Sr. No. 3182. Decision No. 328 of the late board.

If, on examination, it should satisfactorily appear to you that the lands embraced by said surveys were, at the date of O'Carroll's location, lands reserved for said claims, the O'Carroll location must yield to them, because such land is interdicted under the New Madrid act of 17 Feb., 1815; but if, at the time of location, either of the tracts was not reserved, but such lands as was authorized by the N. Madrid act to be located, the New Madrid claim No. 150 will, of course, hold valid against either tract in this category.

80 The facts on this point can be best determined by the S. General from the records of his office, aided by those of the recorder. If there should be no valid claim to any portion of the residue of the O'Carroll claim, and such residue was such land as was allowed by the New Madrid act of 17 Feb., 1815, to be located on the return here of a proper plat and patent certificate for said residue, a patent will issue.

If Mottard's survey, under decision No. 328, late board, be correct, { Mottard No. 328, late board. } he will be entitled to a certificate on account of the valid interference with him by the "St. Louis Common claim," and also by the 4th survey above, and by Cottard, No. 3183. Whether he will be entitled to the area elsewhere, in lieu of the small portion of his claim west of the St. Louis Common line and south of survey No. 3308, (4th,) will of course depend upon the fact as to whether or not it was reserved land for Mottard at the time of the N. Madrid location No. 150. If it was, he hold that portion; if not, he will be entitled to a certificate elsewhere for the area of said portion also.

Very respectfully, your ob't servant,

RICHARD M. YOUNG,
*Commissioner.*

F. R. CONWAY, Esqr.,
*Surveyor General, St. Louis, Missouri.*

OFFICE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSOURI,
*St. Louis, May 4th*, 1863.

I hereby certify that the foregoing is correctly transcribed from a letter of Comm'r Richard M. Young to Surveyor General F. R. Conway, the original of which is on file in this office.

W'M CUDDY,
*Surveyor General.*

Defendants then gave in evidence the will of Samuel McRee, as follows:

*Will of Sam. McRee.*

I, Samuel McRee, of the United States Army, make this my last will and testament. I direct that all my just debts be paid. I bequeath to

my eldest son living at my death my watch and yatagan, and to each of my other children living at my death I bequeath a watch, to be purchased by my executrix for them. I devise and bequeath to my wife, Mary McRee, all my estate, real and personal, and all monies, choses in action, and effects which now belong to me, or to which I may be entitled at my death, wheresoever the same may be situated or by whatsoever title the same may be held, out of which is excepted the legacies before given to my children: To have and to hold the whole of my estate so devised and bequeathed to her unto the said Mary McRee, and her heirs.

In thus vesting in my wife the title to my whole estate and property, I am influenced by the consideration that if this my will shall go into force by my death, the whole responsibility of training up and educating our children will be thrown upon my wife, and I regard it as
81 proper that my children shall feel their dependence upon their surviving parent. I have such confidence in my wife's judgment and direction that I feel that I can safely leave to her the proper use of my estate for her benefit and that of our children, and the proper division of it among the children, as circumstances may require; and therefore I give it all to her. I name my wife, Mary McRee, my sole executrix, and revoke all other wills.

In testimony whereof I have hereto set my hand and seal this second day of October, eighteen hundred and forty-five.

S. McREE. [SEAL.]

Signed, sealed, published, and declared by the testator to be his last will, in our presence, who, in his presence, at his request, and in the presence of each other, subscribed our names as witnesses.

H. R. GAMBLE.
BARTON BATES.

STATE OF MISSOURI, *County of St. Louis, ss:*

Be it remembered that, on this twenty-first day of August, in the year of our Lord one thousand eight hundred and forty-nine, before me, Peter Ferguson, judge of probate of the county of St. Louis, personally appeared Hamilton R. Gamble and Barton Bates, subscribing witnesses to the preceding instrument in writing, who, being by me duly sworn, on their oath say that they believe that Samuel McRee, the testator, signed his name to said instrument in their presence, and, as *will* as they recollect, published and declared the same to be his last will; that they subscribed their names thereto in the presence of the testator as witnesses to the same; and, at the time of so doing, he, the testator, was of sound and disposing mind, to the best of their knowledge and belief.

H. R. GAMBLE,
BARTON BATES.

Sworn to and subscribed before me this 21st day of August, 1849.

PETER FERGUSON,
*Judge of———Probate.*

I, Peter Ferguson, judge of probate of the county of Saint Louis, having examined the preceding instrument in writing, purporting to be the last will and testament of Samuel McRee, and the testimony of Hamilton R. Gamble and Barton Bates, subscribing witnesses thereto,

consider that said instrument is duly proved to be the last will and testament of said Samuel McRee, deceased.

In testimony whereof I hereto set my hand and affix the seal of the probate court of the county of Saint Louis, at office, in said county, this twenty-first day of August, in the year one thousand eight hundred and forty-nine.

[SEAL.] PETER FERGUSON,
*Judge of Probate.*

82 STATE OF MISSOURI, *County of St. Louis, ss:*

I, Milton H. Wash, clerk of the probate court of the county of Saint Louis, certify that the foregoing is a true copy of the last will and testament of Samuel McRee, deceased, as the same remains on file and of record in the office of judge of probate of the county of St. Louis aforesaid.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in the city of Saint Louis, this twenty-sixth day of November, in the year of our Lord one thousand eight hundred and sixty-three.

MILTON H. WASH, *Clerk.*

Also the patent certificate to James Y. O'Carroll, or his legal representatives, for the 640 acres, embracing the land in controversy, as follows:

*Patent certificate to James Y. O'Carroll, &c.*

OFFICE OF THE RECORDER OF LAND TITLES,
*St. Louis, 26th March*, 1862.

Patent certificate No. 494:

It is hereby certified that, under the provisions of the second section of the act of Congress approved the 17th of Feb., 1815, entitled "An act for the relief of the inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," Frederick Bates, recorder of land titles in that territory, issued on the 30th of November, 1815, his certificate, numbered 150, to James Y. O'Carroll or his legal representatives, for six hundred and forty acres of land, in lieu of a tract of same amount that had been confirmed to said O'Carroll, but since relinquished to the United States under the said act. It is further certified that it appears from the accompanying plat and transcript of survey, numbered 2498, authenticated and returned to this office on this day by William Cuddy, surveyor general for Illinois and Missouri, that this claim has been regularly located and surveyed in township 45 north of the base line, and range 7 east of the 5th principal meridian, in the State of Missouri. It is further certified that said survey, No. 2498, is in part interfered with by the following surveys of other claims, to wit, survey number 3125 of the Saint Louis Commons, confirmed by the act of Congress of 13th June, 1812, entitled "An act making further provision for settling the claims to land in the Territory of Missouri;" surveys No. 2973, of Amable Guion or neuve Lecompte's legal representatives; 3307, of Joachim Roy's legal representatives; and 3308, of Hubert, dit Berry, Tabeau's legal representatives, which were confirmed by the said act of 13th June, 1812, and the supplementary act of the 26th May, 1824, entitled "An act supplementary to an act passed on the thirtieth day of June, one thousand

eight hundred and twelve, entitled 'An act making further pro-
83 vision for settling the claims to land in the Territory of Missouri;'" survey No. 3183, of Francis Cottard, confirmed by the act of Congress of 29th April, 1816, entitled "An act for the confirmation of certain claims to land in the western district of the State of Louisiana, in the Territory of Missouri;" and survey No. 3182, of Joseph Mottard, or his legal representatatives, confirmed by the act of Congress of the 4th of July, 1836, entitled "An act confirming claims to land in the State of Missouri, and for other purpose," but which survey No. 3182 was land reserved at the time of the location of the claim of James Y. O'Carroll.

Now, therefore, be it known that Jame Y. O'Carroll, or his legal representatives, is entitled to receive a patent for the aforesaid survey No. 2498, saving and excepting therefrom the interferences aforesaid, which amount to three hundred and seventy-nine acres and seventy-two hundredths of an acre, with the express understanding that this saving and excepting clause is not intended to preclude the said James Y. O'Carroll or representatives from seeking a judicial settlement *or* his or their rights, if any exist, to said interferences.

OFFICE OF THE U. S. RECORDER OF LAND TITLES,
*St. Louis, Sept. 28th*, 1865.

I hereby certify that the foregoing is a true and correct copy of patent certificate No. 494, issued in favor of James Y. O'Carroll or *or* his legal representatives, as the same is found on pages 73 and 74 in the book of "Record of Pat. Certificate;" which book is used and preserved in this office.

FRED'K MOSBERGER, *Recorder.*

[U. S. stamp.]

The plaintiff then offered in evidence the following depositions and documents, which the court excluded on the ground that there was no evidence tending to prove allegations in the answer touching the manner and circumstances under which the plaintiff acquired the title claimed by him to the premises in dispute:

*Deposition of W'm T. Mason.*

WILLIAM T. MASON, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposes and says:

I am a member of the St. Louis bar. I read law with Mr. Gibson. I have been in Mr. Gibson's office since the fall of 1856, and remained there as a student about nine months; was then admitted to the bar, and remained in the same office until 1860, when Mr. Gibson moved from the office, and I still occupy the same office.

Question. Did you ever purchase any portion of the James Y. O'Carroll tract, survey No. 2498, from any person? And, if so, state from whom.

84 Answer. Yes, sir; I purchased the title of John Ruddle, who lives in or near Batesville, Arkansas, in May, 1859.

Question. For whom did you purchase that title; how much did you give for it; and whose money was paid for it; and by whom were you paid for your services in that matter?

Answer. I purchased the title for Mrs. Mary MacRee. I gave one thousand dollars for it. I paid for it with Mrs. Mary MacRee's money. Mrs. Mary MacRee paid me for my services. I made out a bill and gave

her a receipt; my expenses amounted to $80 or $100. I charged $150 for my services. I held the title for some months for Mrs. MacRee, and was then directed by her attorney and agent to dispose of the same; and I did so, under the direction of Mr. Gibson, Mrs. MacRee's agent and attorney. I disposed of it by deed. Mr. Fergus MacRee was in Mr. Gibson's office at the time I made the deeds; he was in the office all the time I held the title; he was a son of Mrs. Mary MacRee; he was acquainted with business of his mother; collected rents and transacted other business for her; instructed me what to do in some matters. Fergus MacRee and I were in the same office together, roomed together, and he knew all the circumstances of the purchase and deeds that were afterwards made, why they were made, and frequently talked the matter over.

Question. Why was that portion of the land in possession of Chouteau conveyed to Charles Gibson? Under whose directions was that conveyance made, and what was the consideration, and was Fergus MacRee fully acquainted with the same at the time?

(Objected to by defendants' counsel, B. A. Hill, esq., as irrelevant and incompetent.)

Answer. The land was conveyed under the direction of Mrs. MacRee, and, as I understood at the time, for services rendered by Mr. Gibson to her. Fergus McRee was acquainted with the circumstances, and why the conveyance was made.

Question. Where any efforts made by said Gibson to make an arrangement whereby the case of Berthold and others against MacRee and McDonald should be compromised on the basis of the plaintiff's title, in that case claimed being vested in Mrs. MacRee, and that said Gibson would thereupon convey to the Chouteaus his title to that portion of the O'Carroll tract which was in the possession of Chouteau.

(Objected to by defendants' counsel, B. A. Hill, esq., as incompetent and irrelevant.)

Answer. Yes, frequent efforts were made to carry out an arrangement on that basis.

(Letter marked "Exhibit A" shown witness. Said letter is hereto attached, and written by C. Gibson to John R. Shepley, esq.)

Witness says: I have seen this letter before. I made two copies; one copy was signed by Mr. Gibson, and I carried it in person to Mr. Shepley at or about the day of the date of said letter.

(Letter marked "Exhibit B," from Charles Gibson to P. Chouteau, shown witness. Said letter is hereto attached.)

85 Witness says: The original letter, of which Exhibit B is a copy, was delivered by me to Mr. Chouteau, at or about the day of its date.

(Defendants' counsel, B. A. Hill, objects to said letters and the answers of witness as incompetent, irrelevant, and impertinent.)

Cross-examined by defendant Pierre Chouteau, jr., counsel, B. B. Hill, esq.:

Question. Did you ever see the James Y. O'Carroll tract?

Answer. No, sir; I never saw the James Y. O'Carroll tract in New Madrid.

Question. Did you ever know George Ruddle?

Answer. No, sir.

Question. Did you ever know that Jno. Ruddle had any title to the O'Carroll tract in New Madrid, of your own personal knowledge?

Answer. I don't know.

Question. At the time you bought John Ruddel's interest in said tract, did you have any personal knowledge of the interest or claim of John Ruddel to the said tract in New Madrid?

Answer. I knew everything the record shows; I had examined the claim on record; I had no personal knowledge except what the record showed.

Question. Did you know that suits were pending in the name of Peter H. Holmes against Mary MacRee and her tenants, and Pierre Chouteau, jr., and his servants, for the recovery of the portion of the New Madrid location, in survey No. 2498, in St. Louis County, at the time you procured the interest or title, supposed to be in John Ruddle, to the New Madrid tract and location?

Answer. I knew certain suits were pending, as stated in the question.

Question. Do you know whether the deed from John Ruddel, obtained by you, was obtained for the purpose of aiding in the defence of said suit brought by Peter H. Holmes?

Answer. I do not know, of my own knowledge, that such was the case; I have an opinion about it, but don't know.

Question. Were you informed that such was the fact by Charles Gibson or Furgus McRee?

(Objected to by plaintiff's counsel, as to that portion relating to Furgus MacRee, as hearsay.)

Answer. As to Mr. Gibson, he never told me anything about it; Furgus MacRee may have told me so; I think he did; he gave it as his opinion, when he did say so, that the object was to quiet the title.

Question. Who directed you to take the title from John Ruddle in your own name?

Answer. I think it was optional with me; my instructions were to get the title as circumstances indicated; if I could have got it in Mrs. MacRee's name I would have done so, but found the man obstinate; I was acting then as agent of Mrs. MacRee entirely.

Re-examined by plaintiff's counsel:

Question. Did Fergus MacRee, or anybody else, ever assert or
86 intimate to you, or any one to your knowledge, that the title you bought from John Ruddel was purchased for the purpose of quieting the claim of the defendants in this case, or either of them, in any manner whatever?

(Objected to by defendants' counsel as leading and incompetent.)

Answer. I cannot say that he ever did.

W'M T. MASON.

*Robert V. Corcoran's depositions.*

ROBERT V. CORCORAN, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposes and says:

I studied law in plaintiff's office; am a lawyer; first commenced studying law with the plaintiff in September, 1856, and remained there until Mr. Mason came to the office of plaintiff; I was the agent who purchased the title of certain of the Ruddle heirs to the O'Carroll tract in St. Louis County; I acted as agent, and purchased the title of all the Ruddle heirs to the O'Carroll tract, except the title of John Ruddle. The titles were purchased for the benefit of, and with the money of, Mrs. MacRee.

To my knowledge none of the titles were bought for Pierre Chouteau, jr. I understood at the time that the money paid to me for my

services and for the titles were out of the funds of Mrs. MacRee. I mean by those titles mentioned above the titles in the name of the plaintiff, and for which deeds were made to him.

ROBERT V. CORCORAN.

*Deposition of W'm G. McRee.*

WILLIAM G. MACREE, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposes and says:

I am a student at law. The titles of the Ruddle heirs to the O'Car-
tract were purchased by the plaintiff for the benefit of, and with the money belonging to, my mother, Mrs. Mary MacRee. The plaintiff never claimed any portion of the titles bought of the Ruddle heirs as against my mother. The plaintiff mentioned at the time that all the titles of said Ruddle heirs held by him was bought with the money, and held for the benefit, of my mother, and was ready to dispose of the same in any manner whatever, as she might direct.

The title of the Ruddle heirs to that portion of the O'Carroll tract claimed by Pierre Chouteau, jr., was given by mother to the plaintiff, on account of the manner in which he defended the case brought against her by Chouteau and other parties; it was a free gift by my mother to the plaintiff, and was not solicited by him from her. After the title was given to plaintiff, he offered to Charles P. Choutead to make his (Chouteau's) title to that portion of the O'Carroll tract, claimed by him, perfect under Ruddel, if he (Chouteau) would cause the title claimed by him, Berthold, and others against Mrs. McRee's homestead to be vested in her. Plaintiff made various attempts to accomplish that negotiation, but failed in doing so. There was no understanding between my mother and plaintiff, or any of the Chouteaus,
that any portion of the titles so purchased by the plaintiffs was
87 purchased for the benefit of P. Chouthau, jr., or any other Chouteau.

There was no understanding or agreement whatever between my mother and Pierre Chouteau, or Charles P. Chouteau, or any one acting for them, that any portion of the title so purchased by the plaintiff was to be enjoyed by them or either of them.

My mother had no communication with either of the Chouteaus, and would have none. She would have not purchased any titles with them, and would have nothing to do with them at all.

Neither of the Chouteaus assisted my mother in defending the Holmes case.

The Chouteaus did not and would not pay any of the fees of Geyer, Gamble or Bates in those cases. My mother paid Mr. Geyer $1,000 00, Mr. Bates $500 00, and Mr. Gamble $1,500 00 for his fees at Washington, and do not remember how much Mr. Gamble received for his services in the supreme court of Missouri. My mother would not have permitted the plaintiff, as her agent, to have purchased any of the said titles for her, or either of the Chouteaus, jointly or in common. She positively declined to have anything to do with them, or permit her agent to have anything to do with them.

W. G. McREE.

Cross-examination by defendant Pierre Chouteau, jr., counsel, B. A. Hill, esqr.:

(Defendant's counsel at the same time objected to so much of the

deposition of this witness as relates to the offer of Charles P. Chouteau to make his title as irrelevant, incompetent, res inter alios acta.)

Question. Before the purchase of any of the pretended Ruddle titles, did your mother have any understanding in regard to how the titles were to be purchased, in whose name, for what object?

Answer. She was informed by Mr. Gibson that those titles were in existence, and were necessary to protect her title to the lands in controversy, and were bought with her money and for her sole use and benefit. I was present at a number of conversations between my mother and plaintiff, in which this matter was discussed before the purchase.

Question. Do you know whether any of the attorneys of Pierre Chouteau, jr., assisted in the defense of the cases against your mother or her tenants in the Holme cases?

Answer. I cannot say positively that I do of my own knowledge.

W. G. McREE.

*Deposition of Mary McRee.*

Mrs. MARY MACREE, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposes and says:

I am the widow of Lieut. Col. Samuel McRee, of the Regular Army. My husband and I made a deed to Pierre Chouteau, jr., to that part of the O'Carroll tract claimed by him, (Chouteau.) The deed was 88 made about Sept. or Oct., 1845. This was the only deed we made to him for that land. Nothing was paid to my husband or myself for that deed.

Col. W'm MacRee, brother of my husband, desired Mr. Chouteau, and urged him, to join him in the purchase of the O'Carroll tract, and take the half of it. Chouteau declined, because he thought the title bad. Afterwards Col. W'm MacRee borrowed the money of Chouteau and bought the whole tract. After this Chouteau desired Col. W'm MacRee to convey to him the 64 arpents. Col. W'm MacRee afterwards died, without making any conveyance or promise to convey. Five or six weeks after the death of Col. W'm MacRee, Mr. Chouteau visited my husband at Prairie du Chien for the purpose of obtaining a deed from him for the 64 arpens. He did not pretend that Col. W'm MacRee had made any pledge to convey the property, but said he was confident he would have conveyed it, and referred to William Carr Lane, Peter Lindell, Major Graham, and Col. Brant to substantiate his statement. Col. MacRee replied to him jocularly that he, Chouteau, had said he did not consider the title worth anything.

Mr. Chouteau urged Col. MacRee very much to make a deed. Col. MacRee told Chouteau he would be in St. Louis in two or three months, and he would then ascertain from the gentlemen above named what would be the course pursued by his brother, and that he would carry it out. Mr. Chouteau then asked Col. MacRee to use his influence with the other two heirs of Col. W'm McRee to get a title, which my husband refused to do, saying that they were heirs at law, and in no way obligated to carry out his brother's action, but that he intended making a proposition to purchase the heirs' interests, in which case the matter would be entirely in his own hands.

The gentlemen referred to all said that they had no doubt that Col. W'm MacRee would have given Chouteau the title, but they all thought that Col. Samuel MacRee was in no way bound to do it;

but my husband, nevertheless, concluded, and did make a deed. Mr. Chouteau visited my husband at Prairie du Chien, in 1833, when the above conversation took place. In 1834 an appointment was made by my husband and Mr. Chouteau to meet at Lawyer Gamble's office, to make a deed for the 64 arpents, when Mr. Chouteau, to the disgust and amazement of Col. MacRee, laid claim to half of the tract, instead of the 64 arpents. My husband felt so outraged that he would have nothing to do with Mr. Chouteau, and told Chouteau what he thought of him. A deed was finally made in 1845, for the purpose of complying with the intention of Col. W'm MacRee, and for no other consideration. Mr. Chouteau, about two or three years after the meeting at Mr. Gamble's office, demanded his mortgage money, and it was paid to him; Mr. Gamble advising him that, when he demanded his money, he had no legal claim, and he lost the shadow of an honorable claim. None of the heirs of Charles Gratiot set up any claim to the lands of my husband, or pretended to have any, during my husband's life.

89 Three or four years after the death of my husband they set up the claim involved in the case of Chouteau, Berthold, and others against myself and McDonald. That suit cost me about $5,000.

I was acquainted at the time with the circumstances under which the plaintiff bought the title of the Ruddle heirs to the O'Carroll tract in St. Louis County. The titles were purchased for my benefit, but with the plaintiff's money, he advancing the money and charging it to me. There was no agreement between myself or the plaintiff, as my agent, in the purchase of those titles, whereby Chouteau was to have the titles or derive any benefit from the purchase. On the contrary, I would have nothing to do with them, and forbid Mr. Gibson, as my agent, to have anything to do with them.

The titles were taken in the plaintiff's name, with my entire approbation.

The plaintiff often mentioned to me that he was ready to dispose of the titles at any time in any manner that I thought proper.

It was my desire that the plaintiff should hold that portion of the O'Carroll tract claimed by Chouteaus for the purpose of checkmating them. The plaintiff proposed to Mr. Charles P. Chouteau to make his title good to the 64 arpents, if he would get a quitclaim from the Gratiot heirs for the Jeannette arpent, being my homestead. This proposition was made repeatedly. It was made repeatedly after I had given plaintiff the title to the 64 arpents. Mr. Charles P. Chouteau offered the title of himself, wife, and Mrs. Montholou, but failed to induce the rest of the heirs to do likewise, and the negotiations broke off there, as Mr. Gibson refused to take a portion of the heirs of the title to the Jeannette arpents; he wanted a perfect title. In case Mr. Chouteau complied with the proposition of plaintiff, Mr. Gibson was to have got nothing for his title. I gave plaintiff the title, and he of his own motion endeavored to use it with Chouteau, as aforesaid, for the purpose of settling two lawsuits and of relieving me of the burden of law.

Gibson insisted on having the whole of the Gratiot title to the homestead, in order to settle up the case of Chouteau, Berthold, and others against me. Messrs. Geyer, Gamble, and Bates were employed by me to defend the Holmes case, in addition to plaintiff. I paid Mr. Geyer $500 in land court, and $500 in circuit court of the United States. I paid Mr. Gamble $1,500 at Washington, and in the supreme court of this State a large fee; I don't remember how much. I paid Mr. Bates $500. No portion of the amounts paid by me to the above-named gentlemen were paid by Chouteau, and he never intended to pay them. He

never paid any cost of the litigation, nor never intended to pay any. Mr. Hill or Shepley, as his counsel, or any one else as his counsel, never rendered any assistance in the defence of the Holmes cases.

MARY McREE.

90 EXHIBIT "A."—*Letter of Gibson to Shepley.*

ST. LOUIS, *April 2d*, 1857.

Mr. JOHN R. SHEPLEY.

DEAR SIR: The title I hold to that portion of the O'Carroll tract, for which I have brought suit against Mr. Charles P. Chouteau and al., is derived from the heirs of George Ruddel, who have conveyed to me, and is a title that I know cannot be successfully defended against.

I do not, however, covet any of Mr. Chouteau's land, but, at the same time, I do not intend that he shall have any of Mrs. MacRee's land, who is my client. I am willing to have either war or peace. It is for Mr. Chouteau to choose for himself; but, if war, the blows will not be all on his side. As to who will be most successful, time and the courts will determine.

The case of Berthold and al. vs. McDonald and MacRee is, I undertake to say, a bad case in law, and a disgraceful one in fact, on the part of the plaintiffs, and particularly on the part of Mr. Pierre Chouteau, whose deed, as administrator of Charles Gratiot, my clients holds for the land. I am authorized to speak in these plain terms as to the moral of that case, as well from the facts thereof as from the judgment of the supreme court upon the moral propriety of the heirs of Gen. Gratiot permitting such a case to be brought.

You are aware of the decision. In justice to Mr. Chouteau, who bears the character of a highly honorable man, I will say that I do not believe that he or many of the Gratiot family ever knew of the kind of a case they were bringing. From all that I know, the whole matter is the invention of Mr. Cha's D. Drake, one of their counsel. Still, if they permit the matter to go farther, we can look only to them. If Mr. Chouteau will cause the title of Gratiot heirs to be vested in Mrs. MacRee, and pay me one thousand dollars, which is about his share of fees and costs of the case of Holmes vs. Fenn, tried in the circuit court of the United States, and of the amount paid by me to the heirs of Ruddle, I will convey to him.

Please answer at your earliest convenience, as I desire to know whether I have try the case or not.

If I receive no answer in ten days from this date, I will take it for granted that Mr. Chouteau declines to accept this proposition, which is open for that length of time and no longer.

Yours, sincerely,

C. GIBSON.

EXHIBIT "B."—*Letters from Gibson to C. and P. Chouteau.*

ST. LOUIS, *Nove. 30th*, 1858.

CHARLES P. CHOUTEAU, Esq.

DEAR SIR: A long time has elapsed since negotiations first commenced between us to compromise my title to land in possession of Mr. John Cook, in U. S. survey No. 2498.

91 It has been deemed advisable for me to notify you that all propositions or attempts to compromise, on my part, are at end, and

which I now do. I will prosecute the case hereafter as promptly as I can.

Yours, respectfully,

C. GIBSON.

This was all the evidence in the case.
The case was tried by the court sitting as a jury.

*Instructions by defendant.*

The defendants asked the following instructions:

The patent to Mary McRee is void, and passes no title to her.

B. A. HILL, *for Def't.*

The recitals in the patent, that Mary McRee is the assignee, by intermediate conveyances, of the title of James Y. O'Carroll, are not any evidence of that fact.

B. A. HILL, *for Def't.*

The patent is in law to James Y. O'Carroll and his legal representatives, and the plaintiff is bound to show her derivative title from James Y. O'Carroll to entitle her to recover in this action.

B. A. HILL, *for Def't.*

All *any* every of the orders, decisions, and acts of the recorder of land titles of surveyor general, the Commissioner, and Secretary of the Interior, made after the date of the patent to Mary McRee, as the assignee of James Y. O'Carroll, are null and void.

B. A. HILL, *for Def't.*

If the court sitting as a jury find from the evidence that the survey of the said New Madrid claim for location, in the name of James Y. O'Carroll, was not returned by the surveyor general to the recorder of land titles before the year 1841, then the said location is void, and the patent issued thereon is void.

B. A. HILL, *for Def't.*

If the court sitting as a jury find that the deeds and documentary evidence read in evidence by the defendant are genuine, then the defendant has shown a title to the land sued for in himself, if the said patent vests any title in James Y. O'Carroll or his legal representatives.

B. A. HILL, *for Def'ts.*

If the court sitting as a jury find from the evidence that the defendant Pierre Chouteau, jr., has had and held open, notorious, and continuous possession of the premises sued for, claiming to own the same in his own right, and to possess the same adversely to all other
92 persons for twenty years prior to the commencement of this suit, the plaintiff cannot recover in this action.

B. A. HILL, *for Def't.*

If the court sitting as a jury find from the evidence that the defendant Pierre Chouteau, jr., has had and held open, notorious and continuous possession of the premises in question sued for, claiming to own the same in his own right, and to possess the same adversely to all

other persons for ten years prior to the commencement of this suit, the plaintiff cannot recover.

B. A. HILL, *for Def't.*

If the court sitting as a jury find from the evidence that Mary McRee is the widow and devise of Samuel McRee, joining with his said wife, conveyed all his interest and title in and to the sixty-four acres sued for to the defendant Pierre Chouteau, by the deed acknowledged on the 31st day of October, 1839, and filed for record on the 8th day of November, 1839, then the plaintiff cannot recover.

B. A. HILL, *for Def't.*

If the court sitting as a jury find from the evidence that the patent given in evidence by the plaintiff was issued upon the claim for location in the name of James Y. O'Carroll, then the said patent *erriers* to the benefit of James Y. O'Carroll and his legal representatives, and the plaintiffs cannot recover the land conveyed to Pr. Chouteau, jr., by Sam'l McRee and wife.

B. A. HILL, *for Def't.*

If the court sitting as a jury find from the evidence that the claim for the location in the name of James Y. O'Carroll, and the patent issued thereon and given in evidence in this case, covers any part of the Field of the Barriere des Noyers, or the Cul de Sac, or the St. Louis Commons, belonging to the town of St. Louis in 1812 and 1862, then the said location and patent are void.

B. A. HILL, *for Def't.*

If the court sitting as a jury find from the evidence that the patent issued on the claim for the New Madrid location, in the name of James Y. O'Carroll to Mary McRee, covers in its whole extent land that must lie within and be contained within an out-boundary line, run so as to include all the common fields and commons, field lots and village lots, in, adjoining, and belonging to the town, now city, of St. Louis, in 1812, then the said patent is void.

B. A. HILL, *for Def't.*

The patent to Mary McRee, as assignee of James Y. O'Carroll, shows upon its face that the New Madrid location covers a portion of the St. Louis Commons, confirmed by the act of June 13th, 1812, and certain field lots in the Cul de Sac Prairie, also confirmed to inhabitants of St. Louis, and that the part of said O'Carroll's location, lying
93 west of the St. Louis Commons, is situated between the Barriere des Noyers Common Fields and the Cul de Sac field lots; and if the court sitting as a jury find from the evidence that an out-boundary line so run as to include the Barriere des Noyers Common Fields and the Cul de Sac field lots on the 13th day of June, 1812, and also the out-lots, common field lots, and commons belonging to the town of St. Louis on said day, would include the land in the O'Carroll location, then the said location is void, and the said patent is void.

B. A. HILL, *for the Def't.*

If the court sitting as a jury find from the evidence that, when the patent read in evidence in this cause was issued, Mary McRee was not the owner of the injured lands, in lieu of which the said patent issued, and that the sixty-four acres of land included in said patent and sued

for in this action was conveyed to said Pierre Chouteau, jr., by Samuel McRee, and Mary, his wife, the grantor of present plaintiff, as a portion of the said New Madrid location; and if the court further finds from the evidence that the said defendant Pierre Chouteau, jr., has a derivative title, by genuine deeds given and read in evidence, to the sixty-four acres of land sued for, from the original location of New Madrid certificate, in the name of James Y. O'Carroll down to himself, then the plaintiff cannot recover.

B. A. HILL,
*Attorney for Defendant.*

The patent to Mary McRee is only "prima facia" evidence of title in the said Mary McRee, and the title to the land located by virtue of the certificate and patent shall be determined according to the rights of the parties to the land, as located by virtue thereof; and if Pierre Chouteau, jr., was the owner at the time of the commenc(e)ment of this suit of the sixty-four acres of land sued for, by virtue of good and sufficient deed or deeds, then the plaintiff cannot recover.

B. A. HILL, *for Def't.*

If Pierre Chouteau, jr., acquired the land sued for of Samuel McRee, and Mary, his wife, and said Mary, grantor of plaintiff, had no other title to the O'Carroll location than through the devise of her said husband, then Pierre Chouteau, jr., was the owner of said land sued for, within the meaning of the 14th instruction, at the time this suit was brought.

B. A. HILL, *for Def't.*

All of which the court refused to give, and to which refusal defendants at the time excepted.

94 The court, on its own motion, then gave the following instruction:

*Instruction by the court.*

GIBSON
*vs.*
CHOUTEAU.

The effect of the patent issued by the United States to Mary MacRee was to invest her with the legal title to the land in dispute; and the title vested in the plaintiff through the deed to him from Mary MacRee is superior to any title shown by the defendant to the land in question, under New Madrid certificate No. 150; and said patent, having issued to said Mary MacRee within ten years next before the commencement of this suit, the possession of said defendant is no bar to the plaintiff's recovery.

C. B. LORD.

JAN'Y, 1865.

To the giving of which defendant at the time excepted.
The court thereupon found a verdict for the plaintiff.

In due time the defendants filed their motion and reasons for new trial, as follows:

*Motion for new trial.*

In the St. Louis land court, October term, 1864.

CHARLES GIBSON
*vs.*
PIERRE CHOUTEAU AND ALS.

And now comes the said defendants, and move the court to set aside the judgment in this court, and grant a new trial in this cause, for the following reasons:

1st. Because the court admitted improper and illegal testimony offered on part of plaintiff.

2d. Because the court refused to admit proper and legal testimony offered on part of defendant.

3d. Because the court gave illegal and improper instructions asked by plaintiff.

4th. Because the court refused to give legal and proper instructions asked by defendants.

5th. Because the court, on its own motion, gave illegal and improper instructions and declarations of law governing the case.

6th. Because the verdict is against law, against evidence, and against the weight of evidence.

7th. Because upon the whole case the verdict should have been for defendant.

B. A. HILL,
GLOVER & SHEPLEY,
*For Def't.*

95 Which the court overruled, and to which overruling the defendants at the time excepted, and file this their bill of exceptions, and pray that the same may be allowed, which is accordingly done.
C. B. LORD.

And afterwards the following further proceedings were had in this cause, to wit:

*Affidavit for appeal and bond filed, and appeal granted.*

March term, 1865, Monday, March 13th, 1865.

CHARLES GIBSON
*vs.*
PIERRE CHOUTEAU, JR., ET AL. } Appeal to the supreme court.

Now at this day there is filed in this cause an affidavit for appeal, and also an appeal bond, as required by the court, in the sum of twenty-five hundred dollars; which bond, on motion of defendants' attorney, is approved by the court, nunc pro tunc, of February 27th, 1865, and acknowledged by the principal and securities, and thereupon an appeal to the supreme court is granted the defendants from the decision herein rendered.

Which affidavit for appeal and bond are in the words and figures following, to wit:

*Affidavit for appeal.*

St. Louis land court.

CHARLES GIBSON
*vs.*
PIERRE CHOUTEAU, JR., ET AL.

Charles P. Chouteau, agent of Pierre Chouteau, jr., being duly sworn, upon his oath says that the appeal prayed for in this cause is not taken for vexation or delay, but because affiant believes the said Pierre Chouteau is aggrieved by the judgment and decision of this court.

CHARLES P. CHOUTEAU.

Sworn to and subscribed before me this 13th day of March, 1865.

ROBERT WHITE, *Clerk*,
By E. P. WALSH, *Deputy*.

*Bond.*

Know all men by these presents that we, Charles P. Chouteau, agent for Pierre Chouteau, jr., as principal, and Britton A. Hill and Jules Valle, as securities, are held and firmly bound unto Charles Gibson in the sum of twenty-five hundred dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors,
96 and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated at St. Louis this day of March, A. D. 1865.

The condition of the above obligation is such, that whereas Pierre Chouteau, jr., has appealed from the judgment rendered against him, and in favor of said Charles Gibson, in the St. Louis land court, for the sum of six hundred dollars damages, and fifty dollars per monthly rents and profits of premises, together with costs:

Now, if the said appellant will pay all costs and damages that may be awarded against him, occasioned by such appeal, and shall prosecute his appeal, and stay waste, and shall perform such judgment as shall be given by the supreme court, and such as the supreme court may direct the St. Louis land court to give, and shall, if the judgment or any part thereof be affirmed, comply with and perform the same so far as it may be affirmed, and pay all damages and costs which may be awarded against him by the supreme court, then this obligation shall be void; otherwise it shall remain in full force and effect.

CHARLES P. CHOUTEAU. [SEAL.]
JULES VALL. [SEAL.]
BRITTON A. HILL. [SEAL.]

Approved by the court, nunc pro tunc, of Feb. 27th, 1865.

ROBERT WHITE, *Clerk*,
By E. P. WALSH, *Deputy*.

St. Louis land court, March term, 1865.

Be it remembered that, on this thirteenth day of March, 1865, personally appeared Charles P. Chouteau, the principal, and Jules Valle and Britton A. Hill, the securities in the foregoing bond, and acknowledge that they executed the same for the purposes therein expressed.

In witness whereof I hereunto set my hand and affix the seal of said court, at office, in St. Louis, the day and year last aforesaid.

[L. S.] ROBERT WHITE, *Clerk.*

STATE OF MISSOURI, *County of St. Louis, ss:*

I, Robert White, clerk of the St. Louis land court, within and for said county, certify the foregoing transcript to be a true and correct copy of the record and proceedings, as required, had in the case of Charles Gibson, plaintiff, and Pierre Chouteau, jr., et al., defendants, as fully as the same remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this thirteenth day of September, A. D. 1865.

[L. S.] ROBERT WHITE, *Clerk,*
By CHA'S LEVY, *D. C.*

[U. S. stamp.]

(Here follows map marked page 128.)

97 STATE OF MISSOURI, *ss:*

Be it remembered that, upon the thirtieth day of September, A. D. one thousand eight hundred and sixty-five, a transcript of the record and proceedings in a certain cause was filed in the clerk's office of the supreme court, held at St. Louis, of the State of Missouri, which transcript was in the words and figures following, to wit:

And afterwards, to wit, upon the 24th day of October, A. D. 1865, the following further proceedings were had in this cause, to wit:

*Ass'g'm'nt of errors filed.*

October term, 1865, Tuesday, October 24th, 1865.

" * * * * *vs.* * * * *,
* * * * " * * * *,
GIBSON " CHOUTEAU,
* * * * " * * * *,
* * * * " * * * *.

" Assignment of errors filed."

And afterwards, to wit, upon the 22d day of November, A. D. 1866, the following further proceedings were had, to wit:

" October term, 1866, Thursday, November 22nd, 1866.

" *Agre'm't filed.*

" CHARLES GIBSON, RESPONDENT,
" *vs.*
" PIERRIE CHOUTEAU, JR., C. P. CHOUTEAU, and John Cook, appellants.

" Agreement to supply record filed."

Which agreement was in the words and figures following, to wit:

"*Agreement.*

"In the supreme court of Missouri.

"CHARLES GIBSON, RESPONDENT,
"*vs.*
"CHARLES P. CHOUTEAU AND MAFFIT, representatives of Pierrie Chouteau, jr. } No. 128, Oct. T., 1866

"The parties consent that the documents hereto annexed be made a part of the record in this case, with the same effect as if incorporated in the same.

98 "The said documents relate to the claim and confirmation to James Y. O'Carroll, in New Madrid County, and they shall be copied by the clerk of this court as a part of the record in any transcript that may be made out to be sent to the Supreme Court of the United States, and inserted in said record on page 29 of the printed record.

"St. Louis, Nov. 22, '66.

"BRITTON A. HILL,
*Att'y for App'lts.*
"C. GIBSON."

Which said documents are in the words and figures following, to wit:

*Documents referred to in agreement.*

Nous, des personnes qui ont en permission de s'etablier sur les terres vaccantes par l'ordre de Mr. Francois Lesieur, capitaine de milice de Sa Majeste Catholique dei cartou la Peitite Prairie, district de la Nouvelle Madrid.

No. 15. James Youns O'Carrolles a ca permission de s'etablier sur les terres vacantes le six Septembre, 1803.

La liste ci contre et d'autre part contiens les noms des differentes personnes dont je me rappelle en ce moment et parfaitement guoigu'il pent q avoir quelque autres personnes dont je puis me rappeler exactement de leurs noms.

LOUISIANA TERRITORY, *New Madrid, ss:*

I, Francis Lesieur, appointed representative of the commandant of the said district for the Little Prairie by official letter of Dr. Henry Peyrou, com't, dated 16 December, 1801, do swear that the foregoing list of permissions to settle, by me granted in pursuance of said authority, is believed to be correct.

Given under my hand at New Madrid the 16 June, 1808.

Sworn in open board at New Madrid 16 June, 1808.

FREDERICK BATES.

RECORDER'S OFFICE,
*St. Louis, 25 February,* 1851.

I certify that the foregoing is correctly transcribed from the original list on file in this office.

ADOLPHE RENARD,
*U. S. Recorder of Land Titles in the State of Missouri.*

This translation added to this paper after this space was crossed over.

A. R.

Translation of the above part in French:

Names of the persons who had permission to settle on the vacant lands under the authority of Mr. Francis Lesieur, captain of militia,
99 for Her Catholic Majesty, at the port of Little Prairie, district of New Madrid.

No. 15. James Young O'Carroll had permission to settle on the vacant land 6th Sept., 1803.

The foregoing list contains the names of the several individuals whose names I now perfectly recollect, though there may be other persons whose names I do not exactly remember.

12 February, 1857.

Correctly translated.

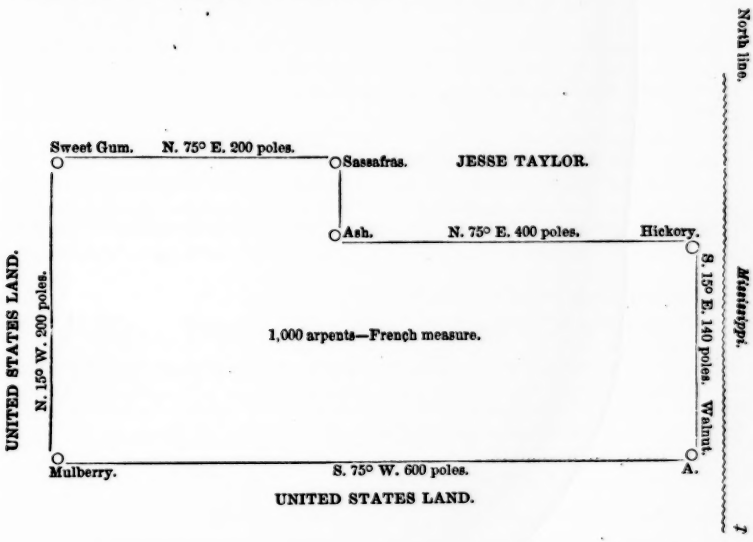
ADOLPHE RENARD.

*Claim.—Statement and Notice.*

James O'Carroll claims to hold 1,000 arpents of land, situated in the district of New Madrid, under the second section of the act of Congress made and provided.

Proprietor, ——— district of New Madrid, James Y. O'Carroll, settlement of Little Prairie.

NOTA.—This land is situated on the river Mississippi, and about two miles from the village of Little Prairie.




I do certify that the above plot represents one thousand arpents of land, French measure, situated in the district of New Madrid, Louisiana Territory, and surveyed by me at the request of James Y. O'Carroll, who claims the same as his settlement right, by virtue of the second section of the act of Congress respecting such claims, and passed on the 2d day of last March.

Given under my hand the fourteenth day of February, in the

100 year of our Lord one thousand eight hundred and six, at New Madrid.

M. AMOUREUX,
*Dep'y Surveyor D't New Madrid.*

Received for record, St. Louis, the 27th February, 1806.
ANTOINE SOULARD,
*Surveyor G'al T. V. Louis'a.*

(See record-book A, p. 424, and original plot.)

MARCH 13, 1806—3 *o'clock p. m.*

The board met agreeably to adjournment. Present, the Honorable Clement B. Penrose and Ja's L. Donaldson, esqrs.

James Y. O'Carroll, claiming as aforesaid 1,000 arpents of land, near the Mississippi, district of New Madrid, produces a certificate of a permission to settle from Francis Lesieur prior to 20 December ,1803, dated 5 December, 1805, and a certificate of survey, dated February 27, 1806, (x " as aforesaid," to wit, under the 2d section of the act of 2d March, 1805.)

George Ruddell, being duly sworn, says that claimant did, prior to, and on the 20th day of December, 1803, actually inhabit and cultivate the said tract of land, and had then a wife and 3 children.

The board grant the said claimant 1,000 arpents of land, situate as aforesaid, provided so much be found vacant there.

On motion, adjourned to to-morrow, ten o'clock a. m.

CLEMENT B. PENROSE.
JAMES L. DONALDSON.

(See book of minutes No. 1, p's 155, 159, and 161.)

MONDAY, *July* 10, 1809.

Board met. Present, John B. C. Lucas, Clement B. Penrose, Frederick Bates, commissioners.

James Y. O'Carroll, claiming 1,000 arpents of land, situate on the Mississippi, district of New Madrid, produces to the board a certified list of pre-emptions to settle, given by Francis Lesieur, commandant, and sworn to by him before Frederick Bates, commissioner, June 16, 1808, on which list claimant is No. 14.

The foregoing testimony in the foregoing claim, taken as aforesaid at New Madrid, June 17, 1808, by Frederick Bates, commissioner.

Jacob Waggoner, duly sworn, says that premises were inhabited and cultivated by claimant in the year either 1802 or 1803, and constantly to the present time; about 10 or 12 acres now in cultivation. Claimant had a wife and 3 children in 1803.

Laid over for decision.

Board adjourned till Wednesday next, nine o'clock a. m.

(See book of minutes No. 4, p's 120, 122, and 121.)

FRIDAY, *December* 14, 1810.

Board met. Present, John B. C. Lucas, Clement B. Penrose, and Frederick Bates, commissioners.

James Y. O'Carroll, claiming 1,000 arpents of land. (See book No. 1, page 159; book No. 4, page 122.) The board grant to James Y.
101 O'Carroll three hundred and fifty arpents of land, and order that

the same be surveyed as nearly in a square as may be, and so as to include his improvements.

Board adjourned till Wednesday next, ten o'clock a. m.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.

(See minutes of the old board, book No. 5, p's 31, 32, and 33.)

THURSDAY, *June* 20, 1811.

Board met. Present, Clement B. Penrose and Frederick Bates, commissioners.

Cert. 1040, James Y. O'Carroll, book 5, p. 32, survey at expense of United States.

Board adjourned till to-morrow, 8 o'clock a. m.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.
FREDERICK BATES.

(See book No. 5, p's 187, 188, 193.)

*Commissioners' certificate No.* 1040, *June* 20, 1811.

LOUISIANA:

We, the undersigned, commissioners for ascertaining and adjusting the titles and claims to lands in the Territory of Louisiana, have decided that James Y. O'Carroll, original claimant, is entitled to a patent under the provisions of the 2d section of an act of Congress of the United States, entitled "An act for ascertaining and adjusting the titles and claims to land within the Territory of Orleans and the district of Louisiana," passed the second day of March, one thousand eight hundred and five, for three hundred and fifty arpents of land, situate in the district of New Madrid, on the Mississippi, and order that the same be surveyed as nearly in a square as may be, and so as to include his improvements, by virtue of a permission from the proper Spanish officer, and also of actual inhabitation and cultivation prior to and on the twentieth day of December, one thousand eight hundred and three.

JOHN B. C. LUCAS.
CLEMENT B. PENROSE.
FREDERICK BATES.

(See original certificate on file.)

*Testimony as to lands in New Madrid damaged by earthquakes.*

James Y. O'Carroll, claiming 640 acres of land, No. 1040 of comm's certificates, and extended by Recorder William Kincheloe, duly sworn, says that this tract was materially injured by earthquakes. (St. Louis, Nov. 10, 1815.)

(See registry of testimony as to land damaged in New Madrid, p's 1, 28, and 29.)

102 *Certificates of material injury by earthquakes.*

| Nos. | Names of claimants on record. | Quantity. | Situation and remarks. |
|---|---|---|---|
| 150 | James Y. O'Carroll. | 640 acres. | Mississippi; cert. dated Nov. 30, 1815; del'd James Tanner. |

(See registry on file.)

*A list of relinquishments of lands materially injured by earthquakes in the late county of New Madrid, present State of Missouri, under act of Congress of* 17 *February*, 1815.

| No. of pat. cert. | Claimant of record. | Quantity. | Situation. | Relinquishment, by whom, and gen'l remarks. |
|---|---|---|---|---|
| 150 | James Y. O'Carroll. | 640 acres. | Mississippi. | James Tanner, legal rep'e. |

(See registry on file.)

*A list of patent certificates prepared for issue by the recorder of land titles, under the act of Congress of* 17 *February*, 1815, *and the supplementary acts for the relief of those inhabitants of the county of New Madrid who suffered by earthquakes.*

| Date. | No. of p. cert. | No. loc. cert. | Original claimant. | No. of survey. | Acres. | To whom delivered. |
|---|---|---|---|---|---|---|
| 16 Aug., 1841. | 447 | 150 | James Y. O'Carroll. | 2,498 | 640 | Gen'l W'm Milburn. |

(See registry on file.)

*Opinions of the recorder of land titles for Missouri Ter'y as to claims entered under act of 13th June, 1812, and proven before 1st Jan'y, 1814, as provided by the act of 3d March, 1813; comprehending also the claims in the late district of Arkansas, which, by act of 2d August, 1813, where permitted to* by *entered until 1st January, 1814, and proven until first of July, 1814; together with the extension of quantity provided by 4th sec. of the act of 3d March, 1813, and confirmations under the act of 12 April, 1814.*

| Warrant or order of survey. | Survey. | Notice to the recorder, by whom. | Quantity claimed. | Where situated. | Poss'n, inhab'n, and cult'd. | Opinions of the recorder. |
|---|---|---|---|---|---|---|
| By U. S. comm's for 350 arp's, cert. 1040. | Survey. | James Y. O'Carroll. | 1,000 arpents. | Mississippi, New Madrid. | ..... | Granted 640 acres, A, p. 424-'5, p. 188. |

RECORDER'S OFFICE, ST. LOUIS, 25 *February*, 1851.

The above is correctly transcribed from pages 1 and 18, in book No. 1, being one of the five small books in this office, with the following endorsement on the first, and also on the fifth book, believed to be in the handwriting of Frederick Bates, to wit: "These five small books are originals, in the proper handwriting of the undersigned, being his decisions on land claims since the adjournment of the late board. They were arranged and fairly transcribed for report to the Commissioner of the General Land Office, but not yet recorded in the books, because they have no authority till sanctioned by Government. St. Louis, Nov. 1, 1815. Frederick Bates, recorder of land titles."

ADOLPHE RENARD,
*U. S. Recorder of Land Titles in the State of Missouri.*

Fee, $100.

both decided by the supreme court of the State, and commencing as far back as the year 1848, as well as the cases of Bagnell vs. Broderick, 13 Peters; Barry vs. Gamble, 3 How., 51; and Lessieur vs. Price, 12 Howard, 74; which cases, in the United States court, conclusively hold that the right to the new-located land passed, by operation of law, when the survey of newly-located land was filed in the office of the recorder of land titles, and that at the same time the title to the injured land passed to the United States, thus affecting, as the court have said, an exchange of land between the two proprietors, the United States on the one hand and James Y. O'Carroll, legal representatives, on the other.

"The question becomes more grave, because by the decision in this case no notice has been taken of it, and it will be said in the Supreme Court of the United States that the supreme court of the State has virtually, if not directly, overruled the cases of Cabanne vs. Lindell and Gray vs. Givens; and that as this was a decision of the highest court of the State upon a local statute, that decision is conclusive upon the courts of the United States.

"Again, in order to give the Supreme Court of the United States jurisdiction, the decision must be against the validity of some act of Congress, &c.

" 1st. The action of ejectment would lie, under our statute, title ejectment on a New Madrid location. By all the authorities, State and Federal, the location became perfect on the return of the survey to the recorder of land titles. (See cases above cited.)

"2d. In the decision filed in this case it is held that the return of the survey in 1841 to the recorder was operative, and that the proceedings subsequent, to annul the patent certificate of 1841, were simply void. (See opinion.)

"The exchange of the new location for the lands injured by earthquakes was effected in 1841. Mr. Chouteau was then in possession of the locus in quo by color of title, by recorded deeds; and whomsoever held the title, right, or claim to the new location in 1841, Mr. Chouteau held adversely to him by substantial enclosures and houses.

110 From that day in 1841 to the day this suit was commenced in 1862, the def't continued in possession, a period of 21 years, open, notorious, and adverse.

"Gray v. Givens, 26 Mo., 300, approving Lindell v. Cabanna, 12 Mo., 184, and Biddle v. Mellon, 13 Mo., and basing the decision on the cases of Bagnell vs. Broderick, 13 Peters; Barry v. Gamble, 3 How., 51, and Lessieur v. Price. 12 How.

"The constitutional question is fully considered, and the right of the State to pass laws for the limitations of actions of ejectment in such cases is distinctly affirmed. Altogether the cases of Gray v. Givens and Cabanne v. Lindell cannot stand if the case at bar be held not to furnish a defence under the statute of limitations.

"Gray v. Givens, 26 Mo., expressly decides that in this case the statute is a complete defence.

"3d. The logical conclusion to be drawn from the cases is that the new location, being perfected 1841, the exchange by operation of law was concluded between the U. States and the leg. rep's of James Y. O'Carroll, and the United States had no further interest, and the issue of the patent in 1862 was a mere form, and it related back to the day of the exchange in 1841, and passed the title to the legal rep's of James Y. O'Carroll as of that day.

"See Landes vs. Brant, 10 How., where the Sup. Ct. of the U. States

held that a patent issued to J. Clamorgan in 1845 related back to the inception of the proceedings in 1806, and passed the title as of that date.

"4th. The equitable title or claim would, under our statute, pass by limitations as perfectly as the legal estate.

"Whatever equity MacRee had in 1838, when he made the deed to Chouteau for a part of the certificate, to wit, 64 acres, passed by the deed, and MacRee had the same equity then that he had in 1846, when the decree was entered.

"Mr. Chouteau's possession under that deed for twenty years adjoining the said MacRee and his devisee, operates, under the case of Biddle v. Mellon, 13 Mo., to give Mr. Chouteau a title to everything that MacRee might have conveyed.

"If MacRee had an equity, it passed if he or any one else had a legal estate; it passed by the force of the possession for 20 years.

"We sincerely hope that a rehearing in this case may be ordered, so as to give us an opportunity of considering the questions at issue, which are of such magnitude as to demand a most thorough and exhausting examination.

"We have the honor to be, most respectfully, your ob't se'v'ts,

"JOHN R. SHEPLEY &
"BRITTON A. HILL,
"*Of Counsel for Devisees of P. Chouteau.*

111 And afterwards, at the same term of the court, the following further proceedings were had in this cause, to wit:

*Rehearing granted.*

"Monday, Dec. 10, 1866.

"CHARLES GIBSON, RESP.,
*vs.*
"PIERRE CHOUTEAU, JR., ET AL., APP'TS.

"The court having heard and fully considered the motion of appellants to set aside the judgment heretofore entered in this cause, and for a rehearing herein, doth sustain the same:

112 "It is therefore ordered that the judgment heretofore entered in this cause be, and the same hereby is, set aside, and that this cause be docketed for a new hearing."

Opinion filed Dec'r 10, 1866, and on said opinion is indorsed these words:

"Rehearing granted on the question of the statute of limitations.—HOLMES."

And afterwards, to wit, at the March term of said court, 1867, the following further proceedings were had in this cause, to wit:

113 *Reargument progressed.*

"Thursday, March 21, 1867.

"CHARLES GIBSON, RESP'T,
"*vs.*
"PIERRE CHOUTEAU, JR., ET AL., APP'TS.

"Now again come the parties aforesaid by their respective attorneys,

whereupon the argument progressed, but, not being concluded, is laid over till to-morrow, Friday, the 22nd inst."

And afterwards, to wit, at the same term of this court, the fol-
114 lowing proceedings were had in this cause, to wit:

*Reargument concluded.*

"Friday, March 22, 1867.

"CHARLES GIBSON, RESP.,
"*vs.*
"PIERRE CHOUTEAU, JR., ET AL., APP'TS.

"Now again come the parties by their attorneys, and thereupon the argument progresses, and, being finished, is submitted to the court. Brief of respondent and brief of appellant filed."

115 And afterwards, to wit, at the same term of said court, the following proceedings were had in said cause, to wit:

*Judgment of reversal.*

"Monday, April 1st, 1867.

"CHARLES GIBSON, RESP.,
"*vs.*
"PIERRE CHOUTEAU, ET AL., APP'TS. } Appeal from St. Louis land court.

"Now again come the parties aforesaid by their attorneys; and the court, being now sufficiently advised of and concerning the prem-
116 ises, doth consider and adjudge that the judgment rendered herein by the said St. Louis land court be reversed, annulled, and for naught held and esteemed; that the respondent take nothing by his suit in this behalf, but that the appellants go thereof without day, and recover of the said respondents their costs and charges herein expended, and have execution therefor.

"Opinion filed."

And afterwards, to wit, at the March term, 1869, of said court, the following further proceedings were had in this cause, to wit:

117 "April 26, 1869.

"CHARLES GIBSON, RESP.,
"*vs*
"PIERRE CHOUTEAU ET AL., APP'TS.

"Now again comes the respondent in proper person, and suggests and shows to the court that there is a diminution in the record herein and moves the court that it order an entry nunc pro tunc to amend the same.

"Motion filed."

And afterwards, to wit, at the October term, 1869, of said court,
118 the following further proceedings were had in this cause, to wit:

October 19, 1869.

"CHARLES GIBSON, RESPONDENT,
"*vs.*
"CHARLES P. CHOUTEAU ET AL., DEVISEES OF Pierre Chouteau, deceased, appellants.

"The court, having heard and fully considered the motion of the respondent for a nunc pro tunc judgment, filed at the March term, 1869, of this court, and held under advisement until the present term, sustains the same.

119 "And it appearing to this court that its order herein of the 10th day of December, 1866, setting aside the judgment of affirmance rendered in this cause on the 3d day of December, 1866, and ordering it docketed for a rehearing, was made upon the question of the statute of limitations, and that the clerk, by omission or clerical mistake, failed to enter the order as made by the court:

"It is therefore ordered that the same be set eside, annulled, and for naught held and esteemed, and that in lieu thereof the following

120 order is made as of the tenth (10th) day of December, A. D. 1866:

"CHARLES GIBSON, RESP.,
"*vs.*
"CHARLES P. CHOUTEAU ET AL., DEVISEES OF Pierre Chouteau, deceased.

"The court, having heard and fully considered the motion of the appellants to set aside the judgment of affirmance in this cause, and for a rehearing herein on the question of the statute of limitation, doth sustain the same:

"It is therefore ordered that the judgment of affirmance ren-

121 dered in this cause be, and the same is hereby, set aside, and that this cause be docketed for a rehearing on the question of the statute of limitation only.

"And it further appearing to this court that its judgment of reversal rendered in this cause at its March term, 1867, was rendered on the question of the statute of limitation only, and that by clerical error such fact was not stated therein:

"It is therefore ordered that such judgment of reversal be, and is hereby, set aside, annulled, and for naught held and esteemed, and in lieu thereof the following judgment is hereby rendered as of the

122 first (1st) day of April, 1867:

"CHARLES GIBSON, RESP.,
"*vs.*
"CHA'S P. CHOUTEAU ET AL., DEVISEES, &c., app'ts.

"Now again come the parties by their respective attorneys, and submit this cause to the court on the question of the statute of limitation.

"And the court, being sufficiently advised of and concerning the premises, doth consider and adjudge that the respondent is barred by the statute of limitations, all other questions herein being held and determined in his favor.

123 "Wherefore it is ordered that the judgment rendered herein by the St. Louis land court be reversed, annulled, and for

naught held and esteemed, and that the respondent take nothing by his suit in this behalf, but that the appellants go thereof without day, and recover of the respondent their costs and charges expended herein, and have execution therefor."

Opinion filed.

And afterwards, to wit, on the 26th day of April, A. D. 1870, the following bond was filed in this cause, to wit:

124 *Bond.*

Know all men by these presents that we, Charles Gibson, as principal, and William G. MacRee are held and firmly bound unto Charles P. Chouteau and Julia Moffitt, devisees of Pierre Chouteau, deceased, in the full and just sum of one thousand dollars, to be paid to the said Charles P. Chouteau and Julia Moffitt, devisees of Pierre Chouteau, deceased, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this seventh day of January, in the year of our Lord one thousand eight hundred and seventy.

125 Whereas lately, at the October term, 1869, of the supreme court of the State of Missouri, in a suit depending in said court between Charles Gibson, plaintiff, and Charles P. Chouteau and Julia Moffitt, devisees of Pierre Chouteau, deceased, defendants, judgment was rendered against the said Charles Gibson, plaintiff, as at the March term, 1867, of said court; and the said Charles Gibson, plaintiff, having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles P. Chouteau and Julia Moffitt, devisees aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

126 Now, the condition of the above obligation is such, that if the said Charles Gibson shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

C. GIBSON. [SEAL.]
W. G. McREE. [SEAL.]

Approved by—

DAVID WAGNER,
*Presiding Judge Sup. Ct. Mo.*

(Indorsed:) Charles Gibson, pl'ff in error, vs. Charles P. Chouteau & others, def'ts in error. Bond on appeal. Filed April 26th, 1870. O. T. Fishback. clerk, per J. F. Baier, D. C.

127 *Citation.*

The United States of America to Charles P. Chouteau and Julia Moffitt, devisees of Pierre Chouteau, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein Charles Gibson is plaintiff in error, and you are defendants in error, to show cause if any there be, why the judgment rendered against the said

128 plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David Wagner, presiding judge of the supreme court of the State of Missouri, this 29th day of January, in the year of our Lord one thousand eight hundred and seventy.

DAVID WAGNER,
*Presiding Judge Sup. Ct. Mo.*

*Acknowledgment of service.*

CHARLES GIBSON
*vs.*
CHARLES P. CHOUTEAU & JULIA MOFFITT, &c.

ST. LOUIS, *Feb'y* 25, 1870.

129 It is admitted that the within citation and notice of writ of error has been served on the undersigned as attorneys of record, and that the premises in dispute are worth more than three thousand dollars.

GLOVER & SHEPLEY,
*Atty's of record on part of Def'ts.*

Served this citation, in the county of St. Louis, State of Missouri, by reading the same to Mrs. Julia Moffitt on the 8th day of March, 1870; also by reading the same to Charles P. Chouteau on the 13th day of April, 1870, in St. Louis Township, State of Missouri.

O. S. FULLER, *Marshal.*

Fee, $2 00.

(Endorsed:) Gibson v. Chouteau. Citation. Filed January 29, 1870. O. T. Fishback, clerk, per Jos. F. Baier, dep. cl'k.

130 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of the State of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, at the October term, 1869, and entered as of March term, 1867, between Charles Gibson, plaintiff in said suit, and Charles P. Chouteau and Julia Moffitt, devisees of Pierre Chouteau, deceased, defendants in said suit, a manifest error hath happened, to the great damage of the said Charles Gibson, plaintiff, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Su-

preme Court, this twenty-eighth day of January, in the year of our Lord one thousand eight hundred and seventy.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the districts of Missouri, dated as aforesaid.

BEN. F. HICKMAN,
*Clerk C. C. U. S. Missouri Districts.*

Allowed by—

DAVID WAGNER,
*Presiding Judge Sup. Ct. Mo.*

131 STATE OF MISSOURI, *ss:*

I, O. T. Fishback, clerk of the supreme court, held at St. Louis, of the State of Missouri, in obediance to the mandate of the within writ, herewith transmit to the honorable Supreme Court of the United States a full, true, and complete transcript of the record and proceedings, and all things concerning the same, in the above-named cause, as fully as the same remains of record and file in my office; and, in so doing, I have adopted the foregoing printed pages as a full, true, and complete copy of said proceedings and record, so far as it goes, in pursuance of the agreement of the parties.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this 21st day of April, A. D. 1870.

[SEAL.]

O. T. FISHBACK, *Clerk*,
Per J. F. BAIER, *Dep'ty.*

(Indorsed:) Gibson vs. Chouteau. Writ of error. Filed January 29, 1870. O. T. Fishback, clerk, per Jos. F. Baier, D. C. $100 00 paid by P. E.

(Indorsement on cover:) No. 498. Charles Gibson, plaintiff in error, vs. Charles P. Chouteau and Julia Moffitt, devisees of Pierre Chouteau, deceased. Missouri sup. court.

Filed 24th October, 1870.

IN THE

# Supreme Court of the United States.

No. 266.—December Term, 1870.

CHARLES GIBSON

vs.

CHARLES P. CHOUTEAU and others.

## *Brief of Counsel for Plaintiff in Error.*

### Statement.

This is an action of ejectment, brought 23d September, 1862, in the St. Louis Land Court, for 64 acres of land, situated in the county of St. Louis, State of Missouri, lying in the northwestern part of survey No. 2,498 of 640 acres made for the legal representatives of James Y. O'Carroll.

By the act of 29th April, 1816, the head right of O'Carroll was confirmed to 640 acres situated in Little Prairie township, county of New Madrid.

Under the act of 17 February, 1815, the Recorder of Land Titles gave a certificate No. 150, and dated November 30th, 1815, in favor of the legal representatives of O'Carroll for 640 acres in lieu of said land in New

Madrid county, which had been injured by earthquakes. This was located by the above mentioned survey.

The survey, however, as originally returned to the recorder, in 1841, did not show the surveys with which it conflicted. A patent certificate No. 447 issued upon it dated 16 August, 1841, and was forwarded with the survey to the General Land Office for a patent. The patent was not issued, but in a communication dated 19th March, 1847, (p. 69,) the commissioner required the recorder and the surveyor general to consider and report upon the interferences, and ascertain the residue, and adds, that "on the return here of a *proper* plat and patent certificate for said residue a patent will issue." The surveyor general afterwards, in 1862, canceled the plat of 1841, and returned a proper one to the recorder, upon which a new patent certificate, No. 494, dated 16 March, 1862, issued, and upon this corrected plat and new certificate the patent issued.

O'Carroll conveyed the land in New Madrid county, in 1805, to George Ruddell.

In 1816 he conveyed to Tanner & Gillespie, and in the same year Gillespie conveyed to Tanner.

Tanner received said certificate No. 150 and relinquished the injured land to the United States. Tanner conveyed to Christian Wilt in 1816, and gave authority to locate the land, which was done by Wilt.—(Record, p. 21.) Wilt conveyed to Samuel McRee, by decree of the St. Louis Circuit Court on 30th June, 1848.—(Record, p. 60.) Samuel McRee devised this property to his wife, Mary McRee.—(Record, p. 70.) She conveyed to plaintiff.—(Record, p. 18.) The United States patent dated 10 June, 1862, issued to her.—(p. 17.) The defendants also claimed under O'Carroll, but by conveyances which the Supreme Court of Missouri pronounced void.

In September, 1821, Joseph Hertzog filed a bill in the Circuit Court of St. Louis county, alleging that Christian

Wilt was dead; that complainant had been in co-partnership with him in his lifetime; that the land in question had been bought with money belonging to the firm, and that the property belonged rightfully to him as surviving partner, to be applied to the payment of the debts of the firm; made Charles S. Hempstead, brother-in-law of deceased and guardian of George Wilson Wilt, the only heir of deceased, defendant. Hempstead answered, admitting the facts. The court decreed conveyance by Hempstead, which was made.—(p. 34.)

Hertzog conveyed to Robert Wash, trustee of Louis Devotion.—(p. 42.) Wash to Peter Chouteau, jr., in 1825.

Henry Clay, executor of James Morrison, deceased, recovered judgment against said Hertzog and obtained a deed from the sheriff under it for the land.—(p. 46.) Also, in 1832, p. 49, a decree for the land against Wilt's and Hertzog's heirs and Robert Wash. October 11, 1839, Clay conveyed to Ann, James, and Samuel McRee. 1836, Ann and James McRee conveyed to Samuel McRee. 30th August, 1838, Samuel McRee conveyed to Pierre Chouteau, jr. The defendant, Charles P. Chouteau, testified, p. 65, that his father has been in possession of this land as far back as 1826. Berthold testified to the possession by P. Chouteau since 1830.

The Land Court, p. 82, held that "the effect of the patent issued by the United States to Mary McRee was to invest her with the legal title to the land in dispute; and the title vested in the plaintiff through the deed to him from Mary McRee is superior to any title shown by the defendant to the land in question under New Madrid certificate No. 150, and the said patent having issued to said Mary McRee within ten years next before the commencement of this suit, the possession of said defendant is no bar to the plaintiff's recovery." The supreme court in its first decision, p. 93, affirmed this decision and held (39 Mo., pp. 565–6–7–8,) that defendants acquired no title

by the conveyances under which they claim because neither George Wilson Wilt or his heirs were parties to the respective proceedings instituted by Joseph Hertzog and Henry Clay to obtain the title, and that Samuel McRee had not, at the time of his conveyance, acquired title, but did so by the subsequent proceedings, and that the title he then acquired did not enure to Chouteau by virtue of his deed from Samuel McRee of 1838.

As respects the enurement of the patent and the operation of the statute of limitations claimed by defendants, the court says, p. 569:

"The equitable title under the act of Congress to the located land had its inception when the location was made, if not before. The evidence shows that this inchoate equitable title had been transferred through intermediate conveyances to Mary McRee, and, under the operation this doctrine of relation, the patent enured to her as the assignee and legal representative of James Y. O'Carroll, and would have enured to her in like manner even if the patent had been issued in the name of O'Carroll or his legal representative. The inceptive title and the absolute legal title were thus invested in her. It follows that the defendants on the evidence had not even the equitable title which would support the action of ejectment under the statutes of this state. * * *Until the patent issued the legal title remained in the United States, and the statute of limitations did not begin to run against the plaintiff before the date of that patent.* If the defendants had shown themslves to be the owners of the equitable title, as against the plaintiff, standing on his legal title, by patent, the right to the possession thus shown by virtue of the equitable title only would have been inferior to the right of possession by virtue of the absolute legal title, and the plaintiff would still have been entitled to recover in this action but for the operation of the doctrine of relation and direct enurement of the patent to their benefit as owners of the inceptive right and but for the effect of the statute of this state.—(Fenn vs. Holme, 21 H., 481; Hooper vs. Scheimer, 23 ib., 235; French vs. Spencer, ib., 228; R. C., 1855, p. 692, §§ 11 and 12.)"

The Supreme Court of Missouri therefore then held that defendants had no defence, but granted a rehearing afterwards on two questions—*first*, whether the statute of limitations was a defence, and *second*, whether the decree in favor of Hertzog (p. 40) against Hempstead, guardian of George Wilson Wilt, passed the title of said Wilt to Hertzog. The court, on the rehearing, adhered to its decision as to the decree, but held the statute of limitations to be a bar to the action.

The court thus states the grounds of this decision, p. 586:

"It was said in the former opinion that 'until the patent issued the legal title remained in the United States, and the statute of limitations did not begin to run against the plaintiff before the date of the patent.' This conclusion proceeded upon the ground that although the action given by the statute upon the equitable right only, which had passed out of the United States, might be barred, it did not follow that an action based upon the right of entry by virtue of the absolute legal title by patent, would also be barred. *The idea that the fiction of relation could be applied not only to carry the legal title to the owner of the inceptive right through the intermediate conveyances, but also for the purpose of bringing it within the operation of the statute of limitations from the date of the inceptive equity, had not been suggested and had not occurred to us.*

"The argument did not proceed upon this theory, but (as we understand it,) upon the supposition that the whole title passed out of the United States by virtue of the location and exchange, and was, therefore, barred by the statute.

"This position is so directly antagonistic to the repeated decisions of the Supreme Court of the United States that it is considered to be wholly untenable."

The court thus recognized the fact that the legal title remained in the United States till the patent issued, and that the location was but an equitable right, upon which an action was not sustainable in the courts of the United States and was sustainable in the state courts only in virtue of the state statute, and adds, p. 588: "That the two

rights of entry, therefore, are distinct in themselves, and the causes of action have a different foundation. The possession of the land is claimed in both, but by different rights, and if there were nothing more the one cause of action might be barred and not the other." Nevertheless the court finds a way to confound these two distinct things and make the statute of limitations bar the legal title as soon as it passed from the government. This is done by what it admits to be a novel application of *the fiction of relation*, thus, "the legal title is to be considered as passing out of the United States through the patent at its date, but as instantly dropping back in time to the date of the location as the first act or inception of the conveyance, to vest the title in the owner of the equity as of that date and make it pass from him to the patentee named through all the intermediate conveyances, and so that the two rights of entry and the two causes of action are thus merged in one, and the statute may be held to have operated on both at once. The legal title, on making this circuit, necessarily runs around the period of the statute bar, and the action founded on this new right is met by the statute on its way and cut off with that which existed before." The justification for this is, that "each of the parties through whom the patentee derived the equitable right had in succession an effective action for the recovery of the possession of this land during all that time while an adverse possession existed. This action was by statute placed upon the same footing and was equally effectual, as if the party had all the while been invested with the legal title."

The court also decides, p. 594, that the action of the surveyor general in 1862, under the instructions of the commissioner, in annulling the plat returned to the recorder in 1841, was illegal, and holds that to be the date of the location and vesting of the equitable title, from which the statute began to run, and not from 1862, when the plat was filed, on which alone, in the view of the Land Department, a patent could be issued.

A writ of error in this case was returned to the December term of 1868 of this court, and was dismissed because the record did not show that the Supreme Court of Missouri had decided against the title of the plaintiff in error solely on the ground that it was barred by the statute of limitations. Such was the fact, however, and that court, on a motion made by the plaintiff in error after the dismissal of the former writ, directed its clerk to enter up its judgment according to the fact, *nunc pro tunc*.

The questions for consideration here are, therefore,—

*First.* Assuming the location to have been made by the return of a proper survey to the recorder in 1841, and the right of entry given by the Missouri statute on that imperfect title to have been barred when the patent issued in 1862, was the right of entry under the legal title which the patent conferred, also barred?

*Second.* Was the survey returned in 1841 to the recorder a proper survey, or is it the province of the courts to decide it to be so, when the Land Department pronounced against it and annulled it and required another to be returned?

## Argument.

I. The Supreme Court of Missouri, in the language above quoted, shows that defendants' proposition that the whole title passed out of the United States by the location, is contrary to the well settled law.

This court had, in 1858, declared, with respect to this identical O'Carroll location, in the case of Fenn vs. Holme, 21 Howard, p. 488, "that the title remained in the original owner, the government," and that Holme could not maintain an action of ejectment in the courts of the United States on the location till the patent issued. Now, the Supreme Court of Missouri holds that ejectment cannot be maintained after patent has issued, because that title relates to the location in 1841, and takes

date from it, and that as the location was a title on which an action could be maintained in the state courts till it was barred by limitations, the action on the patent which relates to the location is barred also. It follows that no action could ever have been maintained on this title in the courts of the United States.

This court says the locator had no standing in court till he obtained a patent, and the Supreme Court of Missouri holds that he had none after he got the patent. This makes it manifest that the Supreme Court of Missouri has not succeeded by its novel application of the "fiction of relation," which it confesses is a principle "somewhat abstruse and technical," in reconciling the decision of Gray vs. Givens, 26 Missouri, to which it adheres, with the law as settled by this court, with which it is forced to admit that decision conflicts.

The citations made in the opinion of the Supreme Court of Missouri show that the court misapplied the fiction of relation and perverts the maxim *ut res magis valeat quam pereat.* What is the thing or matter to which that maxim and the principle of relation would apply, if applicable at all in the case at bar? It is the plaintiff's title. It is his title, if any, which is to be sustained by the use of the fiction of relation, because the patent which is to relate has no connection with the matter of defence. It is obviously a perversion of the principle to allow it to be invoked by a stranger, not to support, but to destroy the title.

Another citation is the case of Littleton vs. Cross, (3 Barn. & Cress., 317,) which decides that this fiction cannot be applied against the real facts to deprive a party of his defence under the statute of limitation. *A fortiori,* it could not be invoked by a stranger to establish a defence for him under that statute against the title, to which the relation is to be applied, and against the real facts.

It cannot be necessary to discuss elaborately here the

nature and uses of this fiction of relation. The Supreme Court of Missouri endeavors by the use of it to maintain the ground taken by that court in Gray vs. Givens, (26 Mo., p. 251,) which it overlooked in rendering its first decision in this case, and to reconcile its decision in that case with the law as declared by this court in the case of Fenn vs. Holme, and other cases. But it does not avoid the conflict by this means. This court has declared that the equitable title into which the state court merges the legal title, is not a title which gives the holder a standing in the courts of the United States to maintain ejectment. It is only a right of entry given by the state, which the laws of the United States do not recognise, and therefore it is immaterial under those laws how it is taken away, whether by limitation or repeal. Under those laws the legal title remains in the United States till the patent issues, and he is then entitled to enforce possession by ejectment. This is the language of this court in Bagnal vs. Broderick, (13 Peters, 436,) and it is repeated in Fenn vs. Holme (21 H., p. 488). For this purpose the patent draws up to it the inceptive title, instead of the inceptive title drawing back the patent.

This point was pressed with great force and earnestness in the familiar case of Magwire vs. Tyler, and this court in its last decision (8 Wallace, p. 665) held that to allow such a defence was not to hold that the title was barred by limitation, but that "such a defence could not be held good without a direct denial of the foundation of the plaintiff's claim." In that case adverse possession was shown for forty years before the patent issued. But the court said, "prior to the execution and delivery of that patent the title was in the United States," and yet ejectment might have been maintained on the confirmation in the state court at any time, (Magwire vs. Tyler, 1 Black, 199,) though not in the courts of the United States. —(West vs. Cochran, 17 Howard, 403.)

The practical effect of the establishment of this doc-

trine is to annul not only Magwire's title, but to abrogate hundreds of others. Few of the confirmations in Louisiana, and of the locations made under the many laws of the United States, were patented within the time of limitation under the various state statutes.

II. Another point settled by this court in its decisions in the Magwire and Tyler controversy is overruled by the Supreme Court of Missouri in this case. That is, as to the authority of the Land Department over the surveys made of private claims.

In the case of West vs. Cochran, 17 H., 403, this court decided in substance that it was an executive function to make the surveys required by the laws of the United States, and that its action was not ordinarily reviewable by the courts. Of course on a proper basis for an equitable proceeding, its action might be reviewed.

If this principle is adhered to it is not necessary for this court to determine whether a survey which does not show the surveys with which it conflicts is a proper survey to locate a New Madrid certificate. How can the Department know whether the location does not fall entirely upon land exempted from such location unless the conflicting surveys are certified to it?

M. BLAIR,
F. A. DICK.

17 July 1615 —
[illegible] 1796
Dunlap Pond

24 Miami —
21 Flood — 483
20 Ohio

# Supreme Court of the United States.

CHARLES GIBSON

*vs.*

CHARLES P. CHOUTEAU and JULIA MAFFIT.

No. 266. At Adjourned Term in fall of 1871.

STATEMENT AND BRIEF FOR DEFENDANTS IN ERROR.

## STATEMENT.

This case was here in 1868, and the action of the court is reported in the case of Gibson *vs.* Chouteau and *al.* (8 Wall., 314.) Gibson's writ of error was then dismissed for want of jurisdiction. The facts, as appears from the record, are briefly these: This is an action of ejectment, commenced in the State court by Gibson *vs.* P. Chouteau, whose devisees the defendants are. Both parties claim under the same title. Its inception is in this wise:

1. In 1810 the old board of commissioners confirmed to James Y. O'Carroll three hundred and fifty of one thousand arpents which he claimed, which confirmation was in 1815 extended by the recorder of land titles to six hundred and forty acres, finally confirmed by act of Congress of the 29 April, 1816, to "James Y. O'Carroll or his legal representatives."

2. By means of conveyances set out in the record, the title of O'Carroll became in 1816 vested in James Tanner.

3. New Madrid certificate, No. 150, was issued by the then recorder of land titles to James Y. O'Carroll or his legal representatives for six hundred and forty acres of

land injured by earthquakes, authorizing the location of a like quantity for the land so injured on any lands in Missouri, the sale of which was authorized by law. (Record, p. 19.)

4. James Tanner in 1818 conveyed the New Madrid land to Christian Wilt, with authority to locate the certificate.

5. In 1818 Christian Wilt located the certificate No. 150, as the legal representative of James Y. O'Carroll, upon a tract of land, of which the land in controversy in a small portion at its west end. (Record, p. 21.)

6. United States survey No. 2489 of said location of O'Carroll, New Madrid certificate No. 150, was made by Joseph C. Brown, deputy United States surveyor, in April, 1818. (Record, p. 21.)

7. Joseph Hertzog, claiming to own this New Madrid location as surviving partner of a firm composed of himself and Wilt, brought a bill in equity against the heirs of Christian Wilt for a decree of title, and obtained a decree vesting the title in him, and directing Hempstead, as guardian for the minor child, to convey to Hertzog. (Record, p. 36.) The guardian *ad litem* was appointed without any actual service upon the minor on the 10 of September, 1821. Hempstead, under that decree, conveyed to Joseph Hertzog.

8. Hertzog then conveyed the land to Robert Wash, as trustee, to secure a debt of $9,549 due by the late firm of Hertzog & Wilt.

9. Under that deed of trust Wash conveyed to Pierre Chouteau the sixty-four acres sued for on the 29 November, 1824.

10. In 1824 Henry Clay, as executor of Morrison, recovered against Hertzog a judgment, and levied upon this land, sold it, and the sheriff executed a deed to him, dated 17 May, 1825. (Record, p. 46.)

11. On the 10th of May, 1833, a decree was rendered in St. Louis circuit court, in the suit of Henry Clay, as executor of Morrison, against the heirs of Christian Wilt and of

Joseph Hertzog and Robert Wash, vesting in Henry Clay, as such executor, the title to this land. (Record, p. 49.)

12. On the 11th day of October, 1839, Henry Clay, as executor of Morrison, conveyed the land to the heirs of William McRee, deceased, reciting that their father had, in his lifetime, paid him the purchase-money, William McRee, the father, having died prior to 1836. (Record, p. 50.)

13. In 1836 the other heirs of William McRee conveyed all their interest (undivided) to their brother, Samuel McRee. (Record, p. 52.)

14. In 1839 Samuel McRee, *having then all the equitable right he ever had*, by the deed of himself and wife, *acknowledged on the* 31 *October*, 1839, conveyed to Pierre Chouteau, for the consideration of one hundred and fifty dollars, therein acknowledged to have been paid him, the land now in controversy, without any covenant of warranty. Deed recorded November 8, 1839. (Record, pp. 61, 62.)

15. In 1841, and prior to the 16 August, the survey, No. 2489, was returned to the recorder of land titles, and on that day he issued the patent certificate, No. 447, to "James Y. O'Carroll or his legal representatives." (Record, p. 90.)

16. In 1844 Samuel McRee filed his bill in equity against the heirs of Wilt and of Hertzog, reciting the proceedings in the suit of Hertzog *v.* Wilt, and the facts, as exhibited by the bill in that case and the acquirement of the title by him, under the several conveyances above named and *none others*, and stating that he was advised that the decree was not valid; that, by virtue of these conveyances, he unquestionably had the equitable title, and asking a decree, vesting their title in him; and, on the 30 June, 1848, a decree was rendered in his favor for the whole tract of six hundred and forty acres located under New Madrid certificate No. 150. (Record, pp. 53 to 60.)

17. In 1849 Samuel McRee died, leaving a will, by which he devised all his estate to his wife, Mary McRee.

18. On the 26th March, 1862, a new plat of the old survey, No. 2489, showing certain interferences on it with other claims, which the old plat did not contain, was filed

in the office of the recorder of land titles, and on that day the recorder issued a new patent certificate, No. 494, stating that "*James Y. O'Carroll or his legal representatives*" were entitled to a patent. The plat so returned was of the same identical land as before. (Record, p. 72.)

19. On the 10th day of June, 1862, a patent issued, purporting to be issued upon patent certificate No. 494, not to "James Y. O'Carroll or his legal representatives," but to Mary McRee, for the whole tract of six hundred and forty acres. (Record, pp. 13, 14, 15, 16, and 17.)

20. On the 8 August, 1862, Mary McRee conveyed to plaintiff the tract in controversy.

21. In 1863, almost a year after the patent issued, the plaintiff undertook to procure the annullment of patent certificate No. 447, and of the former plat of United States survey No. 2498. The attempted annullment of certificate No. 447 is dated December, 1862, and that of the plat of survey No. 2489 is dated April 2, 1863. (Record, pp. 67 and 68.)

22. The defendants proved exclusive possession in their father (the original defendant in the suit) since 1826, by fences and habitation.

The plaintiff had judgment in the St. Louis land court, which was reversed in the supreme court, from which judgment Gibson appealed to this court. Upon the case being dismissed, for want of jurisdiction, he afterwards applied to the supreme court of Missouri to amend their record, *nunc pro tunc*, so as to show upon what reasons that court had acted in giving its judgment against him, at the March term, 1867.

The supreme court of Missouri, on consideration of Gibson's application, delivered an opinion, (45 Mo., 171, Gibson *v.* Chouteau,) and entered the following order, October 19, 1865:

"It * * * appearing to the court, that its judgment ' of reversal, rendered in this cause at its March term, 1867, ' was rendered on the question of the statute of limitations ' only, and that, by clerical error, such fact was not stated

'thereon, it is therefore ordered, that such judgment of 'reversal be, and the same is hereby, *set aside, annulled, and* '*for naught held and esteemed;* and in lieu thereof, the fol- 'lowing judgment is hereby rendered as of the 1st day of 'April, 1869, viz:

Charles Gibson,
*vs.*
Charles P. Chouteau and Julia Maffitt
Devisees, etc., and John Cook.

"Now, again come the parties, by their respective attor- 'neys, and submit this cause to the court on the question 'of the statute of limitations, and the court, being sufficiently 'advised of and concerning the premises, doth consider and 'adjudge, that the respondent is barred by the statute of 'limitations, all other questions, however, being deter- 'mined in his favor; therefore," &c.

It will be seen that the order of March, 1867, was a perfect order, disposing of the case; and the order of October term, 1869, was the same order, disposing of the case. But, in the first order, the *reason* for the order was omitted; in the last order, the *reason* is set forth. *There is no other difference.*

Gibson, having added the forgoing orders to the record, prosecutes his present writ of error. In all other respects the record is the same that was here in 8 Wallace, p. 314.

BRIEF.

I. There is no jurisdiction of this cause in this court, for

1. The action of the supreme court of Missouri does not entitle Gibson to any other judgment than that which he could claim when the cause was here before. If a court possesses a power to enter an order, *nunc pro tunc*, which was made at a former term, and not entered by fault of the clerk, this does not authorize a modification of an *order actually entered*, so as to show *the reasons* on which it was made, and *so as to enable a party to prosecute a writ of error to which he would not otherwise be entitled.*

When this cause was decided in 1867, in the supreme court of Missouri, reversing Gibson's judgment, then was the time for him to have made up a record on which to prosecute his writ of error.

The judiciary act (1 Brightly, 260) provided, "that no other error should be assigned or regarded as a ground of reversal, * * * than such as appeared *on the face* of the record."

In cases like this, if the parties, or either of them, requested it, the supreme courts of the States have been in the habit of certifying what questions arose and what were decided; but not unless requested by a party.

It is not the business of the court to make of its own motion any certificates or orders to that effect. It is no more the duty of the court in such a case to make a record, showing the questions raised and decided, than it is the duty of a *nisi prius* court to make up a bill of exceptions for a party. The making up a record in the supreme court of a State, in such manner as to show the questions decided, fills the place precisely of a bill of exceptions, in order to show an appellate court what points were made and ruled at *nisi prius*.

But, would any *nisi prius* court be permitted, after the term, to make up a bill of exceptions to show error on the face of the record?

The evidence of the supreme court of Missouri in 1869, *reversing* their order in 1867, and making up a new record to serve the place of a bill of exceptions, in this court were nullities, for want of power in the court to make them after the term. It cannot be disguised that the order of 1869 is not different from the order of 1867, except that that of 1869 gives *reasons* for the order—makes, as we have shown, a bill of exceptions for Gibson. In October, 1869, two of the judges who had made the decision in 1867 had left the bench; only one remained.

2. There is no jurisdiction, because the question decided, as it now appears in the record, was one of limitation.

The case has no resemblance to the case of Magwire *v.* Tyler, (8 Wallace, 650.) In that case there were two separate and independent titles. Magwire claimed nothing under the confirmation to Labeaume, nor did Tyler and others claim anything under the confirmation to Brazeau. In their inception, confirmation, survey, conveyances, and patents, they were entirely distinct and independent. Those claiming under the Labeaume patent, and holding under that, contended that their possession of more than twenty years was a bar against their claiming under the patent to Brazeau. The court decide that such a defence could not prevail, and that this court had jurisdiction of the case, not only because the two titles were separate and independent, but because, until 1862, Magwire claiming under Brazeau, could not sue in any court, neither in the State courts nor in the courts of the United States. That the prior survey was no survey at all, never having been accepted by Magwire, but always protested against and refused. That, until that time, his confirmation attached to no lands, and he had no standing in court.

Here, then, are not two titles, but only one, and the question is, by the laws of the State of Missouri, who owns that title so far as it covers this land. Here there was no inability to sue. The courts of the State of Missouri, if not of those of the United States, were open to Samuel McRee or any one deriving title from him since 1841, to bring suit and eject Chouteau if they could. Nor is it by any means clear that McRee could not maintain an action in the courts of the United States, The case of Holme *v.* Penn, simply holding that without a patent no action of *ejectment* could be maintained *in the circuit court of the United States.*

In making its decision, the Supreme Court does not decide against any right acquired under a law of the United States, any more than when by its decree it devests the title obtained by the patentee, and vests it in another person. It simply says, that prior to 1862, the defendant had acquired the equitable title to so much of the O'Car-

roll location as he then held by operation of the laws of the State of Missouri; that such a possession as against a person perfectly competent to sue presumes a conveyance, and that such a person is just as much a "legal representative" of James Y. O'Carroll, as if there had been a perfect deed to him in the chain of conveyances.

II. The decision of the supreme court of Missouri, holding, as it did, that the possession of Chouteau for more than twenty years, since the return of the survey in 1841 to the recorder of land titles, and prior to the date of the patent was an effectual bar to the plaintiff's right to recover, is correct.

In the great majority of instances of confirmations under the several acts of Congress, provisions are made in the act for patents to issue thereon. This is the case in relation to confirmations by the first board of commissioners. The act of Congress of the 21st of April, 1816, provides for a patent to be issued. It is so also as to lands located under a New Madrid location. Yet, as from early times the laws of the State of Missouri had allowed actions of ejectment to be maintained upon these titles without any patent having issued, the owners, in the great majority of instances, have rested quietly, without taking pains to procure a patent.

1st. It will be seen that the title, as between the United States and the owners of the New Madrid certificates, became vested in the holder of the New Madrid certificate at the time of the filing the survey of the land located thereunder in the office of the recorder of land titles. (Bagnall *v.* Broderick, 13 Peters, 448; Barry *v.* Gamble, 3 How., 51; Lesueur *v.* Price, 12 How., 74; Gray *v.* Givens, 26 Mo., 300.) Affirmed in the decision in this case in the supreme court of Missouri.

2d. Since 1825 ejectment would lie in the State courts in favor of a plaintiff claiming under a New Madrid location, the survey of which had been so returned. (See Revised Statutes of Missouri of 1825, p. 234, 235; and subsequent acts.)

The Supreme Court of the United States recognizes the validity of the laws of Missouri giving owners of inchoate titles the right to sue in ejectment. (Magwire *v.* Tyler, 1 Black, 202; Holmes *v.* Fenn, 21 How., 488; Bryan *et al.* *v.* Forsyth, 19 How., at p. 336.)

3d. In Missouri, under the laws of the State, no plaintiff can recover on a New Madrid title on a bare legal title. The plaintiff must have the *best equitable title also*, or he has no standing in court. In 1839 the case of Bagnall *v.* Broderick was heard and decided. (13 Peters, 436.) In that case Robertson, who had owned the claim, sold and conveyed it. Eleven years afterwards he took a patent on the same claim, and this patent was set up against Robertson's vendee. A majority of the judges held, that in an *ejectment in a federal court* the patent must prevail. (13 Peters, 450.) Justice McLean dissented, insisting the fraud could be shown in the ejectment. (Id., 451 to 458, inclusive. See his opinion.) All the judges were of opinion that, on the chancery side of the court, the rights of Bagnall, the equitable owner of the location under Robertson's deed, could be set up—that is, that the vendee of Robertson was honestly entitled to the land.

What was to be done? All the title papers in New Madrid cases were to some one or his legal representatives. The Legislature of Missouri determined to open the door to equitable titles in these cases. So they passed an act declaring: 1. That in a New Madrid case a patent should be only *prima facie* evidence in an ejectment of title in its grantee. 2. That the title to the land located by a New Madrid certificate should be determined in an ejectment according to the equitable rights of parties. (Session acts, 1838–'39, secs. 2 and 3.) The revision of 1845 copied pages 442, sections 12 and 13. In 1849 the new code of practice was adopted, abolishing distinctions of pleading in respect to law and equity. In 1855 the revision omitted the word "*equitable*," but again declared a patent only *prima facie* evidence in an ejectment, and provided the suit should "be determined according to the *rights* of the parties to the

land;" meaning, of course, to recogize *other rights* than those of the patentee. By virtue of this statute, in actions of ejectment concerning New Madrid locations, a court of law has the same powers as a court of equity. (10 Mo. R., 260.)

As this court is now re-examining the case as it came from the State court, it must give effect to the rights of parties as they exist, or are affected by the practice of the State courts.

This State practice forbids a recovery by the plaintiff, provided the defendant really has the equitable title to the land. The cause must be decided here, as it ought to have been decided in the State court.

In the State courts of Missouri an equitable title to land, under the laws of the United States, is superior to the legal title under the same laws.

That is, as to New Madrid locations there is neither law nor equity, but only the *right* which is recognized by the practice in Missouri.

4th. The survey having been returned in 1841, and Chouteau having taken possession, prior to that time, of this land, under a recorded deed, and having had possession ever since under it, down to the commencement of this suit in 1862, adverse to plaintiff and those under whom he claims, the action of plaintiff is barred. (Lindell *v.* Cabanne, 12 Mo., 184; Gray *v.* Givens, 26 Mo., 300; Clemens *v.* Runkel, 34 Mo., 41; Gibson *v.* Chouteau's Heirs, 39 Mo., 536.)

The statute of limitations had extinguished the equity of Mary McRee before the patent was issued to her. Whatever equity she had had passed to Chouteau by virtue of the statute. This court has never held that a patent is a new title to the patentee at its date. The court has always held that the patent inures to the owner of the claim in virtue of which it issued.

This court has always conceded the power and duty of the State courts to decide controversies arising between adverse claimants of inchoate equitable titles emanating from

the general Government prior to patent. But if such actions may be brought at all, prior to patent, in State courts, the power to fix the time in which they shall be brought is inherent. And a right lost by adverse possession under the statute is as much lost as if the claimant had conveyed by deed. A grant presumed by lapse of time is as good as a grant proved by a conveyance. The simple question is, had McRee power to alien her right to this New Madrid warrant prior to patent. If she could have aliened her right, so as to lose the benefit of the patent thereafter issued to her, then the mode of alienation is not material. It may be by deed, or it may be by a possession which, under a law of the State, has ripened into a title just as effectual and as perfect as if made by deed. (Biddle *v.* Mellon, 13 Mo., 335; 3 How., 462.)

Since 1847, the period of limitations, as regards real estate, was fixed at ten years. In the case of Biddle *v.* Mellon, the supreme court of Missouri held, that a possession for the requisite length of time, unsupported by any paper, title, or color, would support an action of ejectment. It follows, therefore, that in 1857 the equitable title held by McRee was as effectually passed to Chouteau as it would have been by sheriff's deed.

Here, then, are four decisions of the supreme court of Missouri, holding, where the controversy is not between two antagonistic titles, but as to who owns the one title, that the possession which, as against the equitable owner, had ripened into a title prior to the emanation of the patent, is a good defence. It is contended by the plaintiff in error that these decisions are antagonistic to decisions of this court in the cases of Holme *v.* Fenn (21 How., 48) and of Magwire *v.* Tyler *et al.*, (8 Wall., 665.) The case of Holme *v.* Fenn does not in the least affect this question. *It is simply a question as to the form of action.* At page 488 the court says: "A practice has prevailed in some of the States '(and among them the State of Missouri) of permitting the 'action of ejectment to be maintained upon warrants for 'land, and upon other titles not complete or legal in their

'character; but this practice, as was so explicitly ruled in 'Bennett *v.* Butterworth, (11 How.,) can in nowise affect 'the jurisdiction of the courts of the United States, who, 'both by the Constitution and by the acts of Congress, 'are required to observe the distinction between legal and 'equitable rights, and to enforce the rules and principles 'of decision appropriate to each;" that is, upon either a confirmation of the first board of commissioners, or a confirmation under the act of 1816, or holding under a New Madrid certificate, surveyed and returned to the recorder of land titles, (as the acts under which these respective titles emanated provided for the issuing of a patent,) until that *conclusive* evidence of title issue, *the common-law action of ejectment would not lie.*

The *radical defect* in the plaintiff's argument is, that he denies that there is any *vesting* of title until the patent issues. No decision can be found that holds any such doctrine. On the contrary, all these decisions hold that *the title passed out* of the *United States* at the time the survey was returned. This is expressly asserted in all these cases. The decision in Fenn *v.* Holme (at page 488) declares only that because "the patent is the *superior and conclusive evidence* of the legal 'title in the courts of the United States," the action of ejectment cannot be maintained without the patent.

It might just as well be contended, under the act of 29 April, 1816, that there was no *vesting* of title under that act, because the statute provided for the issuing of a patent as the conclusive *evidence* of it.

Nor, as we have shown under our first point, is the decision in the case of Magwire *v.* Tyler *et al.*, (8 Wallace,) any more in point. This court decided in that case that, until the survey was returned in 1862, Magwire had no standing in *any* court, because the confirmation attached to no land. He had not accepted the previous survey or patent, and, as the court holds, they were mere nullities. Until that survey was made he could not sue in the State courts, because, though a suit in ejectment could be sustained in those courts on a confirmation, yet, as this was a confirmation to be sur-

veyed, no action would lie in those courts until that had been done; and that, not having been done till 1862, Magwire had until that time no standing in court, either in the courts of the United States or of the State. The survey which he repudiated located the land in an entirely different place, and in no court had he a right to sue for the land *in that place* until the survey of 1862. The court accordingly held that, as he could not sue, no statute of limitation ran against him.

The additional distinction between this case and the case of Magwire *v.* Tyler *et al.* is, that in the one case this court was passing upon the effect of statute of limitations, as between parties claiming under separate and independent titles, both emanating from the United States; and the question here is, who owns one and the same title, has already been adverted to under the first point. The questions, then, as presented in the case of Magwire *v.* Tyler, bear no similarity to the case at bar.

The decisions of the supreme court of the State of Missouri, previous to the decisions in this case, were placed upon these grounds, to wit, that the statute of limitations will commence running in favor of an adverse possession from the time of the accrual of a right to dispossess by action the adverse possessor; that an action in the nature of an ejectment can be maintained in the courts of this State upon a New Madrid location prior to the issuing of the patent by statute, and that it is competent for the State to pass such an act; and that the holding that the statute of limitations applies to such locations does not infringe upon the right of the United States to dispose of its own domain; that the statute commenced to run when the survey was returned to the office of the recorder of land titles.

The court in this case put their decision upon somewhat different grounds, but upon grounds no less tenable—that of relation.

In the case of Landis *v.* Brant (10 How., p. 373) the court say: "Applying the doctrine of relation, and taking 'all the several parts and ceremonies necessary to complete

'the title together, 'as one act,' then the confirmation of '1811 and the patent of 1845 must be taken to relate to the 'first act: that of filing the claim in 1805. On this assump-'tion, intermediate conveyances made by the confirmee or 'by the sheriff in his behalf, of a date after the first sub-'stantial act, are covered by the legal title, and pass that 'title to the alienee." Whatever, then, by operation of law, passes the inchoate title out of the patentee prior to the issuing of the patent, operates upon the patent when issued, and passes the title to the person holding by operation of law.

In the case of French *v.* Spencer *et al.*, (21 How., 239,) a military land warrant was located on the 3d of June, 1816, and a patent issued thereon on the 26th of October, 1816, to Fosgit, under whom plaintiff claimed as heir-at-law. Fosgit, prior to the issuing of the patent, had made a deed to defendant. This court held, that while the naked title was in the United States till the issuance of the patent, yet that the patent related back to the date of the location, on the 3d of June, 1816, so as to make the conveyance of Fosgit to defendant operative.

In Stark *v.* Storrs, (6 Wall., 402,) the plaintiff claimed under a title from the United States, initiated on the 1st of February, 1858, on which a patent issued on the 7th of December, 1860. The defendant claimed under a title from the United States, initiated on the 10th of September, 1853, and upon which a patent issued on the 8th of December, 1860, one day after plaintiff's patent. The court in that case held, "that the right to a patent once 'vested is treated by the Government, when dealing with 'the public lands, as equivalent to a patent issued."

This matter of relation is so thoroughly examined, and the different cases relating thereto commented upon, in this case, (in the 39 Mo. R., at pp. 508 to 595,) that it is necessary only to refer to this decision.

The counsel for the plaintiff says: "This court says the 'locator has no standing in court till he obtained a patent, 'and the supreme court of Missouri holds that he had none

'after he got the patent." This is an entire misconception. The court of Missouri says, after she got her patent she had a perfect right to maintain her action in any court, and could maintain it, till it was shown that the title passed out of her by relation, just as Clamorgan's heirs, in the case of Landis *v.* Brant, could have maintained their action under the patent until it was taken out of them in the same way. Nor, is it conceived, are they any more correct when they say that it is the plaintiff"s title alone which is to be sustained by the feature of relation. It was the defendant's title which was sustained in the case of Landis *v.* Brant.

In very many cases of confirmations under acts of Congress, in the State of Missouri, and particularly in this matter of New Madrid locations, conveyances are defective from uncertainty of description, improper acknowledgment—especially of property of the wife, and for other causes. Of confirmations under the acts of 1805 and 1807, and under act of 1816, in not more than one quarter of the cases, it is believed, have ever a patent issued, and of these New Madrid locations a great majority in the interior of the State are still without patents. It will open a flood of litigation if it shall be held that, in these cases, no statute of limitations is of any avail until after the patent shall have issued.

III. The mere fact that the patent issued in the name of Mary McRee instead of, as the patent certificate required, to James Y. O'Carroll, or his legal representatives, does not stand in our way, for—

1st. The patent to Mary McRee, issuing, as it did, upon a patent certificate to John Y. O'Carroll, or his legal representatives, is a nullity. It professes to be a proceeding under the New Madrid act, or some other act supplementary or explanatory. All those acts had expired, and no officer of Government had any power to dispose of lands under any one of them at the date of her patent. (Stoddard *v.* Chambers, 2 How., 285; Cunningham *v.* Ashley,

14 How., 377; Easton *v.* Salisbury, 21 How., 426; Perry *v.* O'Hanlon, 11 Mo., 594.

2d. But if it be good, as far as the land is concerned, she holds it for us—for

(*a*) If the several acts of location, viz: the New Madrid warrant, the survey, and patent certificate, had any vitality and value, they did not belong to Mary McRee, but to Mr. Chouteau; and if they could be perfected into a title, that could only be done for the benefit of the honest and lawful owner. So far as the land in dispute is concerned, Pierre Chouteau was the owner of it, and of the New Madrid certificate covering it. It was his title that was patented, and the patent related back to the date of the location, and must be considered as dated then. It was his interest in said certificate that was surrendered and taken up at the land department when the patent issued. The whole consideration received by Government for said patent, so far as the land in controversy is concerned, moved from Chouteau. Mary McRee surrendered nothing; had nothing to surrender. The plaintiff contends that certificate No. 150, and S. No. 2498, were void as against the United States when the patent issued. Concede it: still they did not belong to Mary McRee; they could not inure to her; they were the property of Mr. Chouteau, and if for them the land has been patented, the benefit must inure to him. The case is simply that, where one seeking to purchase land for himself pays all the money, and, by some mistake, accident, or trick, the deed is made to another against his will.

(*b*) If these decisions are right, holding that the statute of limitations commenced to run in 1841, at the return of the survey, then this equitable right to the land in question had been transferred, by operation of law, from Mary McRee to Chouteau, prior to the issuing of the patent.

(*c*) When one person holds an equitable title to land, and another, by fraud, accident, or mistake, against the will of the equitable owner, contrives to get the legal title in himself, a court of equity will divest that title, and will hold

it to be inferior to the equitable title. "There are some 'things so assential to the nature of the grant [of the legal 'title] that the great principles of justice and law would be 'violated did there not exist some tribunal to which an in-'jured party might appeal, and *in which the means by which 'an elder title was acquired may be examined.*" (8 Mo. R., p. 94.) If a patent has been procured by any fraud or trust, equity will relieve. (7 Mo. R., p. 610.) But it is only after the patent has issued to the wrong party that the court will act, for till then the legal title is not in the power of the court. (9 Mo. R., p. 189.) After the legal title has passed out of the Government, a court of equity will investigate the conduct of the land officers, and any concealment of papers without authority, or other wrong done, will be redressed. (9 Mo. R., 323, 4, 5, 6; 11 Mo. R., pp. 586 to 592.) Nor will these officers be allowed illegally to divest parties of their rights. (9 Mo. R., p. 573.) Any title paper unfairly obtained will be corrected in equity. (12 Mo. R., 333; 36 Mo. R., p. 187–193; 18 How., U. S., 87.) Where a person, originally entitled to a bounty from Government, assigned it to another, and afterwards took a patent to himself, it was held to belong to his assignee by relation. (21 How., U. S., 228.) The confirmation of a claim perfects the same as a title against the Government, but leaves it to its original value when placed in opposition to the rights of another person. (11 Martin R., 212; 24 Mo. R., 132–3.) Where several parties claim title to property with which a special tribunal may deal, as between one party and the Government, and disregard the rights of others, the latter may come into the ordinary courts of justice and litigate their claims. (20 How., U. S., p. 8; 1 Pet., 212; 9 How., U. S., 328; 14 How., U. S., 377; 18 How., U. S., 44.)

The questions in these last mentioned cases were, (1,) whether a party could interpose his equity between the Government and its patentee; (2,) whether the decisions of officers of the land department were conclusive on all persons, and even the Government, till judicially vacated; and it was held they were not conclusive, but the equitable

rights of parties, cut off by issuing a patent, or other official acts, would be set up. The case in 1 Peters, 212, was that of a claim against the Government of Spain, assumed, under treaty, by United States. The claim was allowed by commissioners at the suit of A, and the money was paid to him; held, the allowance only established the validity of the claim, but not the ownership of A, and that B might recover the money from A by proving his right to it. (See 21 How., U. S., 294; 5 Cranch R., 59.)

Mary McRee had no claim to the land in dispute prior to her patent; she did not get her patent on a void entry, she got it on no entry at all; the patent, so far as she was concerned, was a grant without a single preliminary step to acquire land under any law of the United States. Her patent was her first title-paper; of course she had no previous equity to rest upon. Chouteau had the only equities which the Government was to recognize or reject. The Government have, by issuing a patent to Mary McRee, as assignee and legal representative of O'Carroll, recognized fully the claim of Chouteau as the consideration of the patent, and, in equity, the patent is his, to the extent of the land in dispute.

Whenever the United States issues the superior and conclusive evidence of the legal title by its patent, that patent relates back to the inception of the title. (See cases cited as to this relation under the second point.) Also the following: (Taylor *v.* Brown, 5 Cranch, at page 253; Landis *v.* Brant, at page 373, 10 How.; Mitchell *v.* Handfield, 33 Mo., 438.)

So, also, in case of Shaw *v.* Cooper, (7 Pet., 272.) A patent issued in 1822. In 1829 it was surrendered for error, and a new one was then issued. It was held that this last patent had relation back to 1822.

In Jackson *v.* McCall, (3 Cowen, 75,) A purchased premises at sheriff's sale as property of B. B died, and B's devisee brought ejectment. After action brought, A got the deed from sheriff, and the court held, the deed related back to time of sale.

See also Boyd *v.* Longworth, (11 Ohio, 352;) Jackson *v.* Dickinson, (15 John. R., 309;) Jackson *v.* Raymond, (1 John. C., 85; Alexander *v.* Merry, 9 Mo., 524.

(*d*) As early as 1838 the supreme court of Missouri decided the words "O'Carroll or legal representatives," used in the certificate No. 150, and the survey 2498, and patent certificates in this case meant O'Carroll, if living; and, if not, those deriving title from him by descent or purchase. (5 Mo. R., p. 147.) And this has been the settled rule of decision since, and could not now be shaken without great damage to land titles. Recently the Supreme Court of the United States held, these words meant representatives of original owner by *contract* or *operation of law*. (2 Wallace, 605. Now, a title by adverse possession for ten years is a grant by operation of law, and as good as a deed. Equally well settled has it been that it was the business of the *courts* and not of the land *officers* to decide who is the *legal representatives*. This formula was adopted in order to leave that important question to the courts. Such has been the universal understanding of the bar. No land officer has any facilities for trying the question. No one before ever attempted to try it. The decision of it in this case by a land officer, and the attempt to make his opinion conclusive is a bold manœuvre, fraught with nothing but tyranny, fraud, and all manner of injustice. If it succeeds in this case, M. Chouteau will lose this land, worth $100,000, by the writing of two or three words falsely in a patent!

IV. Neither does the pretended annulment of the patent certificate, issued in 1841, *made in December*, 1862, or of the *plat* of survey, No. 2498, *made on the 2d April*, 1863, have the slightest effect upon our rights, for—

1st. In both cases the action was after the patent was issued and this suit brought; and, for this reason, are null and void. (Lott *v.* Prudhomme, 3 Rob. La., 293; 13 La. Ann. R., 128; United States *v.* Stone, 2 Wallace, 535.

2d. The order does not, on its face, pretend to be an annullment of the survey, but only of the plat of the survey.

3d. There is not, and there does not pretend to be, any new survey. There was a new *plat* made out, showing some interferences which the original plat did not show, and it was baptized with a new number, but the location was, and necessarily must have been, precisely the same.

4th. The patent certificate of 1841 and the patent certificate of 1862 were both in existence and in force at the time the patent of 1862 issued. They both state that "James Y. O'Carroll, or his legal representatives," are entitled to receive a patent.

It would be strange, indeed, that when, in 1841, an approved survey is returned to the recorder of land titles, and by this very act transferring the injured land to the Government, that, twenty-one years afterwards, any one can effect the titles of all the persons who claim title under that location, by manipulating an officer to make a new plat of the same survey and issue a new certificate upon this new plat. It was only a part of a cunning device to transfer the land of Choteau to Gibson, as this record shows that Mrs. McRee had transferred this land to Gibson some years before the patent issued. The culmination was, when he prevailed upon some clerk in the land department to judicially decide upon the effect of some twenty or thirty deeds, three decrees in equity, and one will, thereby judicially determining that Mary McRee was "James Y. O'Carroll's legal representative," in order to prevent the statute of limitation running in favor of Pierre Chouteau, as he fondly imagined.

V. The supreme court of Missouri, in deciding that our defense rested *alone* upon a title conferred upon us by the statute of limitations, committed an error.

Upon this branch of the case it is not so much that we complain of the decision of that court, that the deed of McRee to Chouteau, acknowledged and declared on the 31 October, 1839, was a mere quit-claim deed, and could pass no right to the land subsequently acquired by McRee, as to the application of the principle.

Samuel McRee acquired no *new title*, after that conveyance, in any proper acceptation of the term. If, then, we concede that the right still remained, in 1839, in Wilt's heirs and Hertzog's heirs, and till the decree in the case of McRee against them, still we insist that Chouteau had title under McRee, by virtue of the deed of McRee to him, acknowledged on the 31 October, 1839, and delivered 8 November, 1839, not by way of enurement, but by way of *estoppel*, against Samuel McRee, Mary McRee, and Charles Gibson, taking title under Samuel McRee.

It is admitted that, until the survey was returned to the recorder of land titles, in 1841, no title passed to the O'Carroll tract. What, then, was acquired by McRee by Clay's deed? Simply the New Madrid certificate No. 150—the right to locate. Having, then, that right, McRee assigns to Chouteau an interest in it for a valuable consideration. After having assigned this interest in it to Chouteau, the New Madrid certificate No. 150 is located, and the title vested for the first time, on the return of the survey in 1841. Then, after the title was vested, McRee thinks he discovers that he had only acquired the *equitable* title to the certificate and the land, and brings his bill against the heirs of Hertzog and heirs of Wilt, and in that bill *admits and grounds his petition for relief upon the following facts:*

First. That the equitable title to the New Madrid certificate No. 150 and newly located land was in Joseph Hertzog, as surviving partner of Christian Wilt.

Second. That Henry Clay had become possessed of that equitable title.

Third. That Henry Clay had sold it to William McRee, in his lifetime, and been paid for it. (See page 56, and also at page 54, recital in Clay's deed.) William McRee, it appears from deed between his heirs, at page 52, died prior to 1836.

Fourth. That Clay conveyed the land and certificate, so sold to and paid by William McRee, after his death, by his deed of 1839, October 11th, and that the other heirs of

William McRee had conveyed their interest to Samuel McRee.

Fifth. That in this way, and *this way only*, he became the owner of the equitable title to the New Madrid certificate.

Now, at the time he conveyed to Chouteau, McRee had the *equitable* right, and by the decree based upon this same equitable title he obtains the naked legal right. Under these circumstance can there be any doubt (however may have been the assignment of the interest in the New Madrid certificate, or quit-claim to the land that might be, or have been located thereunder) that McRee, when he obtained the legal title through and under that *equity* which he possessed when he sold to Chouteau, held it for Chouteau as far as Chouteau's interest went? McRee, by this decree, *gets no new title*. He merely *perfects* that which he had when he conveyed a part of his interest to Chouteau, and gets it only by averring and proving that he held a complete equitable right to the land when he conveyed to Chouteau.

Samuel McRee and all claiming under him are, by the averments in his bill in chancery, estopped from denying that Joseph Hertzog was the owner, as surviving partner, of the New Madrid certificate No. 150 and any land that might be located thereunder, and had a perfect title to the New Madrid certificate, or to any other chose in action belonging to the partnership, and to equities that might attach to any land by reason of such ownership.

If, therefore, Samuel McRee, at the time he conveyed to Chouteau, (which was after he had obtained all the title he ever had to this land, as before shown,) had and owned the New Madrid location, he, by his deed to Chouteau, conveyed to Chouteau an equitable interest in the New Madrid location, to the extent of the land described in his deed to Chouteau, and Chouteau was the assignee of the New Madrid location to that extent.

He therefore perfected the same title he conveyed to Chouteau for himself and Chouteau, and so understood it,

as is proved by his
till his death, and of M
death, until a controversy
teau, but with the children o
the heirs of Charles Gratiot, in
of land.

It may be asserted that, because the
Chouteau bears date before the date of
McRee, he had not Clay's title when he conve
teau. To this there are two answers: 1st. That,
dated *before*, yet it was acknowledged twenty days *aft*
deed of Clay to McRee. It is elementary law that, *pri*
*facie*, a deed takes effect at the time of its acknowledgment.
(Oatman *v.* Walker, 33 Maine R., 67; Osterhaus *v.* Schomaker, 3 Hill, 517.) A deed is presumed to be delivered when recorded. (2 Hilliard's Real Property, p. 282, note *a;* Chase *v.* Chase, 1 Penn., 32.) 2d. Clay's deed recites the sale to William McRee, in his lifetime, and payment of the purchase-money, which was prior to 1836. Clay's deed relates back to this sale. (1 Johns. Ch., 81; 3 Caines, 261; 2 Johns. R., 520; 4 Johns., 234; 10 How., 573 )

States.

Though we regard the decision of the supreme court of Missouri, as to the effect of the deed of McRee to Chouteau, as to passing an after-acquired title, and as to the effect of the original decree, as erroneous, yet, however true it may be, the principle is misapplied, and does not reach the case here.

GLOVER & SHEPLEY,
*For Respondent.*

William McRee had conveyed their interest to Samuel McRee.

Fifth. That in this way, and *this way only*, he became the owner of the equitable title to the New Madrid certificate.

Now, at the time he conveyed to Chouteau, McRee had the *equitable* right, and by the decree based upon this same equitable title he obtains the naked legal right. Under these circumstance can there be any doubt (however may have been the assignment of the interest in the New Madrid certificate, or quit-claim to the land that might be, or have been located thereunder) that McRee, when he obtained the legal title through and under that *equity* which he possessed when he sold to Chouteau, held it for Chouteau as far as Chouteau's interest went? McRee, by this decree, *gets no new title*. He merely *perfects* that which he had when he conveyed a part of his interest to Chouteau, and gets it only by averring and proving that he held a complete equitable right to the land when he conveyed to Chouteau.

Samuel McRee and all claiming under him are, by the averments in his bill in chancery, estopped from denying that Joseph Hertzog was the owner, as surviving partner, of the New Madrid certificate No. 150 and any land that might be located thereunder, and had a perfect title to the New Madrid certificate, or to any other chose in action belonging to the partnership, and to equities that might attach to any land by reason of such ownership.

If, therefore, Samuel McRee, at the time he conveyed to Chouteau, (which was after he had obtained all the title he ever had to this land, as before shown,) had and owned the New Madrid location, he, by his deed to Chouteau, conveyed to Chouteau an equitable interest in the New Madrid location, to the extent of the land described in his deed to Chouteau, and Chouteau was the assignee of the New Madrid location to that extent.

He therefore perfected the same title he conveyed to Chouteau for himself and Chouteau, and so understood it,

as is proved by his acquiescing in Chouteau's possession till his death, and of Mary McRee's acquiescing, after his death, until a controversy sprang up, not with Pierre Chouteau, but with the children of Pierre Chouteau, as part of the heirs of Charles Gratiot, in reference to another tract of land.

It may be asserted that, because the deed of McRee to Chouteau bears date before the date of Clay's deed to McRee, he had not Clay's title when he conveyed to Chouteau. To this there are two answers: 1st. That, though dated *before*, yet it was acknowledged twenty days *after* the deed of Clay to McRee. It is elementary law that, *prima facie*, a deed takes effect at the time of its acknowledgment. (Oatman *v.* Walker, 33 Maine R., 67; Osterhaus *v.* Schomaker, 3 Hill, 517.) A deed is presumed to be delivered when recorded. (2 Hilliard's Real Property, p. 282, note *a;* Chase *v.* Chase, 1 Penn., 32.) 2d. Clay's deed recites the sale to William McRee, in his lifetime, and payment of the purchase-money, which was prior to 1836. Clay's deed relates back to this sale. (1 Johns. Ch., 81; 3 Caines, 261; 2 Johns. R., 520; 4 Johns., 234; 10 How., 573 )

Though we regard the decision of the supreme court of Missouri, as to the effect of the deed of McRee to Chouteau, as to passing an after-acquired title, and as to the effect of the original decree, as erroneous, yet, however true it may be, the principle is misapplied, and does not reach the case here.

GLOVER & SHEPLEY,
*For Respondent.*

~~Months Supplies~~

Lynch & Bernac

4 Mark 325

4 Blue 280

IN THE

# Supreme Court of the United States.

No. 266.—December Term, 1870.

CHARLES GIBSON

vs.

CHARLES P. CHOUTEAU and others.

## *Brief of Counsel for Plaintiff in Error.*

### Statement.

This is an action of ejectment, brought 23d September, 1862, in the St. Louis Land Court, for 64 acres of land, situated in the county of St. Louis, State of Missouri, lying in the northwestern part of survey No. 2,498 of 640 acres made for the legal representatives of James Y. O'Carroll.

By the act of 29th April, 1816, the head right of O'Carroll was confirmed to 640 acres situated in Little Prairie township, county of New Madrid.

Under the act of 17 February, 1815, the Recorder of Land Titles gave a certificate No. 150, and dated November 30th, 1815, in favor of the legal representatives of O'Carroll for 640 acres in lieu of said land in New

Madrid county, which had been injured by earthquakes. This was located by the above mentioned survey.

The survey, however, as originally returned to the recorder, in 1841, did not show the surveys with which it conflicted. A patent certificate No. 447 issued upon it dated 16 August, 1841, and was forwarded with the survey to the General Land Office for a patent. The patent was not issued, but in a communication dated 19th March, 1847, (p. 69,) the commissioner required the recorder and the surveyor general to consider and report upon the interferences, and ascertain the residue, and adds, that "on the return here of a *proper* plat and patent certificate for said residue a patent will issue." The surveyor general afterwards, in 1862, canceled the plat of 1841, and returned a proper one to the recorder, upon which a new patent certificate, No. 494, dated 16 March, 1862, issued, and upon this corrected plat and new certificate the patent issued.

O'Carroll conveyed the land in New Madrid county, in 1805, to George Ruddell.

In 1816 he conveyed to Tanner & Gillespie, and in the same year Gillespie conveyed to Tanner.

Tanner received said certificate No. 150 and relinquished the injured land to the United States. Tanner conveyed to Christian Wilt in 1816, and gave authority to locate the land, which was done by Wilt.—(Record, p. 21.) Wilt conveyed to Samuel McRee, by decree of the St. Louis Circuit Court on 30th June, 1848.—(Record, p. 60.) Samuel McRee devised this property to his wife, Mary McRee.—(Record, p. 70.) She conveyed to plaintiff.—(Record, p. 18.) The United States patent dated 10 June, 1862, issued to her.—(p. 17.) The defendants also claimed under O'Carroll, but by conveyances which the Supreme Court of Missouri pronounced void.

In September, 1821, Joseph Hertzog filed a bill in the Circuit Court of St. Louis county, alleging that Christian

Wilt was dead; that complainant had been in co-partnership with him in his lifetime; that the land in question had been bought with money belonging to the firm, and that the property belonged rightfully to him as surviving partner, to be applied to the payment of the debts of the firm; made Charles S. Hempstead, brother-in-law of deceased and guardian of George Wilson Wilt, the only heir of deceased, defendant. Hempstead answered, admitting the facts. The court decreed conveyance by Hempstead, which was made.—(p. 34.)

Hertzog conveyed to Robert Wash, trustee of Louis Devotion.—(p. 42.) Wash to Peter Chouteau, jr., in 1825.

Henry Clay, executor of James Morrison, deceased, recovered judgment against said Hertzog and obtained a deed from the sheriff under it for the land.—(p. 46.) Also, in 1832, p. 49, a decree for the land against Wilt's and Hertzog's heirs and Robert Wash. October 11, 1839, Clay conveyed to Ann, James, and Samuel McRee. 1836, Ann and James McRee conveyed to Samuel McRee. 30th August, 1838, Samuel McRee conveyed to Pierre Chouteau, jr. The defendant, Charles P. Chouteau, testified, p. 65, that his father has been in possession of this land as far back as 1826. Berthold testified to the possession by P. Chouteau since 1830.

The Land Court, p. 82, held that "the effect of the patent issued by the United States to Mary McRee was to invest her with the legal title to the land in dispute; and the title vested in the plaintiff through the deed to him from Mary McRee is superior to any title shown by the defendant to the land in question under New Madrid certificate No. 150, and the said patent having issued to said Mary McKee within ten years next before the commencement of this suit, the possession of said defendant is no bar to the plaintiff's recovery." The supreme court in its first decision, p. 93, affirmed this decision and held (39 Mo., pp. 565–6–7–8,) that defendants acquired no title

by the conveyances under which they claim because neither George Wilson Wilt or his heirs were parties to the respective proceedings instituted by Joseph Hertzog and Henry Clay to obtain the title, and that Samuel McRee had not, at the time of his conveyance, acquired title, but did so by the subsequent proceedings, and that the title he then acquired did not enure to Chouteau by virtue of his deed from Samuel McRee of 1838.

As respects the enurement of the patent and the operation of the statute of limitations claimed by defendants, the court says, p. 569:

"The equitable title under the act of Congress to the located land had its inception when the location was made, if not before. The evidence shows that this inchoate equitable title had been transferred through intermediate conveyances to Mary McRee, and, under the operation this doctrine of relation, the patent enured to her as the assignee and legal representative of James Y. O'Carroll, and would have enured to her in like manner even if the patent had been issued in the name of O'Carroll or his legal representative. The inceptive title and the absolute legal title were thus invested in her. It follows that the defendants on the evidence had not even the equitable title which would support the action of ejectment under the statutes of this state. * * *Until the patent issued the legal title remained in the United States, and the statute of limitations did not begin to run against the plaintiff before the date of that patent.* If the defendants had shown themslves to be the owners of the equitable title, as against the plaintiff, standing on his legal title, by patent, the right to the possession thus shown by virtue of the equitable title only would have been inferior to the right of possession by virtue of the absolute legal title, and the plaintiff would still have been entitled to recover in this action but for the operation of the doctrine of relation and direct enurement of the patent to their benefit as owners of the inceptive right and but for the effect of the statute of this state.—(Fenn vs. Holme, 21 H., 481; Hooper vs. Scheimer, 23 ib., 235; French vs. Spencer, ib., 228; R. C., 1855, p. 692, §§ 11 and 12.)"

The Supreme Court of Missouri therefore then held that defendants had no defence, but granted a rehearing afterwards on two questions—*first*, whether the statute of limitations was a defence, and *second*, whether the decree in favor of Hertzog (p. 40) against Hempstead, guardian of George Wilson Wilt, passed the title of said Wilt to Hertzog. The court, on the rehearing, adhered to its decision as to the decree, but held the statute of limitations to be a bar to the action.

The court thus states the grounds of this decision, p. 586:

"It was said in the former opinion that 'until the patent issued the legal title remained in the United States, and the statute of limitations did not begin to run against the plaintiff before the date of the patent.' This conclusion proceeded upon the ground that although the action given by the statute upon the equitable right only, which had passed out of the United States, might be barred, it did not follow that an action based upon the right of entry by virtue of the absolute legal title by patent, would also be barred. *The idea that the fiction of relation could be applied not only to carry the legal title to the owner of the inceptive right through the intermediate conveyances, but also for the purpose of bringing it within the operation of the statute of limitations from the date of the inceptive equity, had not been suggested and had not occurred to us.*

"The argument did not proceed upon this theory, but (as we understand it,) upon the supposition that the whole title passed out of the United States by virtue of the location and exchange, and was, therefore, barred by the statute.

"This position is so directly antagonistic to the repeated decisions of the Supreme Court of the United States that it is considered to be wholly untenable."

The court thus recognized the fact that the legal title remained in the United States till the patent issued, and that the location was but an equitable right, upon which an action was not sustainable in the courts of the United States and was sustainable in the state courts only in virtue of the state statute, and adds, p. 588: "That the two

rights of entry, therefore, are distinct in themselves, and the causes of action have a different foundation. The possession of the land is claimed in both, but by different rights, and if there were nothing more the one cause of action might be barred and not the other." Nevertheless the court finds a way to confound these two distinct things and make the statute of limitations bar the legal title as soon as it passed from the government. This is done by what it admits to be a novel application of *the fiction of relation*, thus, "the legal title is to be considered as passing out of the United States through the patent at its date, but as instantly dropping back in time to the date of the location as the first act or inception of the conveyance, to vest the title in the owner of the equity as of that date and make it pass from him to the patentee named through all the intermediate conveyances, and so that the two rights of entry and the two causes of action are thus merged in one, and the statute may be held to have operated on both at once. The legal title, on making this circuit, necessarily runs around the period of the statute bar, and the action founded on this new right is met by the statute on its way and cut off with that which existed before." The justification for this is, that "each of the parties through whom the patentee derived the equitable right had in succession an effective action for the recovery of the possession of this land during all that time while an adverse possession existed. This action was by statute placed upon the same footing and was equally effectual, as if the party had all the while been invested with the legal title."

The court also decides, p. 594, that the action of the surveyor general in 1862, under the instructions of the commissioner, in annulling the plat returned to the recorder in 1841, was illegal, and holds that to be the date of the location and vesting of the equitable title, from which the statute began to run, and not from 1862, when the plat was filed, on which alone, in the view of the Land Department, a patent could be issued.

A writ of error in this case was returned to the December term of 1868 of this court, and was dismissed because the record did not show that the Supreme Court of Missouri had decided against the title of the plaintiff in error solely on the ground that it was barred by the statute of limitations. Such was the fact, however, and that court, on a motion made by the plaintiff in error after the dismissal of the former writ, directed its clerk to enter up its judgment according to the fact, *nunc pro tunc*.

The questions for consideration here are, therefore,—

*First.* Assuming the location to have been made by the return of a proper survey to the recorder in 1841, and the right of entry given by the Missouri statute on that imperfect title to have been barred when the patent issued in 1862, was the right of entry under the legal title which the patent conferred, also barred?

*Second.* Was the survey returned in 1841 to the recorder a proper survey, or is it the province of the courts to decide it to be so, when the Land Department pronounced against it and annulled it and required another to be returned?

## Argument.

I. The Supreme Court of Missouri, in the language above quoted, shows that defendants' proposition that the whole title passed out of the United States by the location, is contrary to the well settled law.

This court had, in 1858, declared, with respect to this identical O'Carroll location, in the case of Fenn vs. Holme, 21 Howard, p. 488, "that the title remained in the original owner, the government," and that Holme could not maintain an action of ejectment in the courts of the United States on the location till the patent issued. Now, the Supreme Court of Missouri holds that ejectment cannot be maintained after patent has issued, because that title relates to the location in 1841, and takes

date from it, and that as the location was a title on which an action could be maintained in the state courts till it was barred by limitations, the action on the patent which relates to the location is barred also. It follows that no action could ever have been maintained on this title in the courts of the United States.

This court says the locator had no standing in court till he obtained a patent, and the Supreme Court of Missouri holds that he had none after he got the patent. This makes it manifest that the Supreme Court of Missouri has not succeeded by its novel application of the "fiction of relation," which it confesses is a principle "somewhat abstruse and technical," in reconciling the decision of Gray vs. Givens, 26 Missouri, to which it adheres, with the law as settled by this court, with which it is forced to admit that decision conflicts.

The citations made in the opinion of the Supreme Court of Missouri show that the court misapplied the fiction of relation and perverts the maxim *ut res magis valeat quam pereat.* What is the thing or matter to which that maxim and the principle of relation would apply, if applicable at all in the case at bar? It is the plaintiff's title. It is his title, if any, which is to be sustained by the use of the fiction of relation, because the patent which is to relate has no connection with the matter of defence. It is obviously a perversion of the principle to allow it to be invoked by a stranger, not to support, but to destroy the title.

Another citation is the case of Littleton vs. Cross, (3 Barn. & Cress., 317,) which decides that this fiction cannot be applied against the real facts to deprive a party of his defence under the statute of limitation. *A fortiori,* it could not be invoked by a stranger to establish a defence for him under that statute against the title, to which the relation is to be applied, and against the real facts.

It cannot be necessary to discuss elaborately here the

nature and uses of this fiction of relation. The Supreme Court of Missouri endeavors by the use of it to maintain the ground taken by that court in Gray vs. Givens, (26 Mo., p. 251,) which it overlooked in rendering its first decision in this case, and to reconcile its decision in that case with the law as declared by this court in the case of Fenn vs. Holme, and other cases. But it does not avoid the conflict by this means. This court has declared that the equitable title into which the state court merges the legal title, is not a title which gives the holder a standing in the courts of the United States to maintain ejectment. It is only a right of entry given by the state, which the laws of the United States do not recognise, and therefore it is immaterial under those laws how it is taken away, whether by limitation or repeal. Under those laws the legal title remains in the United States till the patent issues, and he is then entitled to enforce possession by ejectment. This is the language of this court in Bagnal vs. Broderick, (13 Peters, 436,) and it is repeated in Fenn vs. Holme (21 H., p. 488). For this purpose the patent draws up to it the inceptive title, instead of the inceptive title drawing back the patent.

This point was pressed with great force and earnestness in the familiar case of Magwire vs. Tyler, and this court in its last decision (8 Wallace, p. 665) held that to allow such a defence was not to hold that the title was barred by limitation, but that "such a defence could not be held good without a direct denial of the foundation of the plaintiff's claim." In that case adverse possession was shown for forty years before the patent issued. But the court said, "prior to the execution and delivery of that patent the title was in the United States," and yet ejectment might have been maintained on the confirmation in the state court at any time, (Magwire vs. Tyler, 1 Black, 199,) though not in the courts of the United States. —(West vs. Cochran, 17 Howard, 403.)

The practical effect of the establishment of this doc-

trine is to annul not only Magwire's title, but to abrogate hundreds of others. Few of the confirmations in Louisiana, and of the locations made under the many laws of the United States, were patented within the time of limitation under the various state statutes.

II. Another point settled by this court in its decisions in the Magwire and Tyler controversy is overruled by the Supreme Court of Missouri in this case. That is, as to the authority of the Land Department over the surveys made of private claims.

In the case of West vs. Cochran, 17 H., 403, this court decided in substance that it was an executive function to make the surveys required by the laws of the United States, and that its action was not ordinarily reviewable by the courts. Of course on a proper basis for an equitable proceeding, its action might be reviewed.

If this principle is adhered to it is not necessary for this court to determine whether a survey which does not show the surveys with which it conflicts is a proper survey to locate a New Madrid certificate. How can the Department know whether the location does not fall entirely upon land exempted from such location unless the conflicting surveys are certified to it?

III. The court below (39 Mo., 565) say "the evidence showed that the equitable title to the located land became vested in the heir of Christian Wilt in 1841."

This is in accordance with the decisions of this court in Bagnell vs. Broderick, 13 Pet., 436, 448; Lesseur vs. Price, 12 How., 59; Barry vs. Gamble, 3 How., 32; Rector vs. Ashley, 6 Wall., 142, which hold that the *act of the party* does not invest him with the equitable title; that the law authorizes an exchange of lands, and until the assent of the government is given no change in the title occurs, and that the only evidence of this assent is the action of the recorder of land titles, who had to

"examine, pass upon, and record" the plat of survey returned by the surveyor general to the recorder. This *return* the recorder was made the agent of Congress to pass upon, and *if he decided* that "the location and survey had been properly made, then the United States assented to the exchange and not until then." "A concurrent vestiture of title must have occurred."—(12 How., 74.)

In Rector vs. Ashley, 6 Wall., 142, 151, Mr. Justice Miller, speaking of the New Madrid title, says: "But the rights of claimant are to be measured by the act of Congress, and not exclusively by what he may or may not be able to do. * As the claimant's rights are created by that statute, they must be governed by its provisions, whether they be hard or lenient. It seems to us clear, from the foregoing cases, that the court intended to decide that until this was done (the return of the survey to the recorder and approval by him) the claimant acquired no vested right to the land; no title legal or equitable."

In the case at bar the return of survey was in 1841, and the Supreme Court of Missouri, in passing on the title up to that time, say "the evidence showed that the *equitable* title to the located land became vested in the heir of Christian Wilt."—(*Supra.*)

On this evidence no question arises in this court, for the record shows the chain of title to be deeds inter parties, and chancery proceedings in the state courts to divest title out of Wilt's heirs, which the state court hold to be void and of no effect.

There were three defective links in McRee's title to the inchoate claim, or so-called equity; the first is the deed of Hempstead, as guardian of Wilt's minor heir, dated September 10, 1821—void because authorized by a decree rendered against an infant who was never in court. Consequently no title passed to Hertzog in 1821.

On the 17th of May, 1825, on the judgment against Hertzog, the sheriff conveyed this defective title only, to

Clay, and on the 11th of October, 1839, Clay conveyed the same to McRee.

Upon this chain of title, the court below say, nothing passed out of Wilt or his infant heir down to 1841, when the equitable title to the land in question had inception. When the patent issued in 1862 it related back to this inception of the equity in 1841, and the chain of title existing up to 1841 is in legal effect incorporated into the patent. But this chain of title embraces only valid conveyances. As the chancery proceedings against Wilt's heir were of no effect, they became no part of the patent, and thus the title passed by the patent vested in Wilt's heir as of the date of 1841, back to which the patent relates.

After 1841 McRee obtained, through regular proceedings in the state court of chancery, a decree which passed to him the equitable title which in 1841 vested in Wilt's heir. When McRee then got the title, in 1848, there was no equitable or legal title in Chouteau, and the question now is, did it pass to Chouteau from McRee. Chouteau relies on his quit-claim deed of 1838, as passing such after acquired title, and this was decided against him by the court below. —(39 Mo., 566-7-8.)

The defendant's defect of title is that he has a quit-claim deed, made in 1838, and his effort is to have it construed as though it was a warranty deed.

Chouteau having no title, in 1841, to the New Madrid land, the government received nothing from him by way of exchange, and was, therefore, not bound to give him anything in exchange.

It is thus shown that the patent was properly issued to Mary McRee according to the decision of the Land Department and of the court below, which says: "It follows that the defendants, on the evidence, had not even the equitable title which would support the action of ejectment under the statutes of this state. They were reduced to the naked possession without the shadow of a title."—(39 Mo., 569.) "It has uniformly been held

in this state that a mere intruder without title was not in a position that would enable him to call in question or dispute the correctness or validity of documentary evidence of title issued by authority of the United States. They are binding on the government while they subsist in force, and no mere stranger or intruder can be allowed to complain."—(Id., 570.)

Stark vs. Starrs, 6 Wall., 418, says: "The plaintiff must first show some right, legal or equitable, in the premises before he can call in question the validity of the title of the defendant."

## The Patent.

IV. The patent here is under the same law and in the same form as that in Bagnell vs. Broderick, 13 Pet., 436. It was properly issued to Mary McRee.

The act of 17th February, 1815, directs that the patent shall issue "in like manner as is provided by law for other public lands," and this is provided for by act of May 18, 1796. Dunlap's Laws of the United States, p. 151, saying that the "purchaser, or his assignee or other legal representative, shall be entitled to a patent."

Baldwin's Heirs vs. Massey, 7 Wheat., 148, is a case in which the patent was issued to the assignee.

As the defendant has no title the patent is conclusive in favor of plaintiff.—(Bagnell vs. Broderick, 13 Pet., 436; Beard vs. Federy, 3 Wall., 486; Field vs. Seabuy, 19 How., 332; Hale vs. Ganes, 22 How., 160; Fenn vs. Holme, 21 How., 488.)

In Bagnell vs. Broderick, 13 Pet., 436, the plaintiff relied upon the patent, and the defendant relied upon evidence that the patentee had conveyed his interest in the relinquished land, and this the court declared it to be no defence in this action at law, saying: "If Byrne's devisees can show him to have been the true owner of the land relinquished, and that the patent issued to Robertson by

mistake, then the equity side of the court is the proper forum and a bill the proper remedy to investigate the equities of the parties." 450. The question is one of title, not equity. Fenn vs. Holme, 21 How., 487, is explicit on this point, holding that if the nature of the title set up as the basis of a right by plaintiff or defendant is equitable that the case shall be so set out in the proper forum, thus: "But if the claim be an equitable one, he must proceed according to the rules which this court has prescribed regulating proceedings in equity." And the same reason and rule exist in the practice in the state courts of Missouri.

In Magwire vs. Vice, 20 Mo., 431, where plaintiff sued on a legal title to recover land, and gave in evidence a patent, and the defendant relied upon an equity, the court ruled against him, saying: "Although our present practice act abolishes all distinctions between legal and equitable actions, yet a party who seeks relief on a merely equitable title, against a legal title, must in his pleadings, whether he is plaintiff or defendant, set forth such a state of facts as would have entitled him to the relief he seeks under the old form of proceedings. When a party, by his pleadings, sets forth a merely legal title, he can not on the trial be let into the proof of facts which show that, having an equity, he is entitled to a conveyance of the legal title. If he wants such relief he must prepare his pleadings with an eye to obtain it, and this must be done whether he is seeking relief as plaintiff or defendant."

The pleadings in this case put in issue only the legal title.

The case at bar is covered by Bagnell vs. Broderick, in which the structure of a New Madrid title was considered. The act of Feb. 17, 1815, (3 Statutes, 211,) authorized "persons owning lands in the county of New Madrid," which had been injured by the earthquake, to locate the like quantity on the public lands, and provides that the title to the injured lands "shall revert to and become vested in the United States."

This court say "the recorder of land titles was made *the judge* to ascertain who was entitled to the benefit of the act, and to what extent, on the examination of the evidences of claim." Congress saw fit to provide that the patent should merge all questions of ownership which might arise as to the new land. On what evidence can a court of law overthrow the proof of title made out by the patent resting on this act of Congress, which provides or one mode of ascertaining the facts preliminary to the patent?

It is in view of this intention of Congress, shown by the structure of this law, that the court refused, in Bagnell vs. Broderick, to go behind the patent to find an equitable ownership in some person of another name than the patentee.

The court say: "We are bound to presume, for the purposes of this action, that all previous steps had been taken by John Robertson, jr., to entitle himself to the patent, and that he had the superior right to obtain it notwithstanding the claim set up by Byrne; and having obtained the patent, Robertson had the best title, to-wit, the fee, known to a court of law. Congress has the sole power to declare the dignity and effect of titles emanating from the United States, and the whole legislation of the federal government in reference to public lands declares the patent the superior and conclusive evidence of legal title."

It is clear that the only opposing claimant must be one who shows title to the land in New Madrid. Chouteau has no deed for that land. He has a deed for the land in St. Louis county, made in 1838, three years before the inchoate title passed out of the United States. His deed is from McRee, is a quit-claim, and it is admitted that in 1838 the legal and equitable title was in the United States. Bagnell vs. Broderick, Lesseur vs. Price, Barry vs. Gamble, and Rector vs. Ashley all decide that the application of the party to enter the land confers no right.